Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether Goldsboro Christian Schools, Inc., a private, church-related school, is precluded from qualifying as a tax-exempt educational organization under 26 U.S.C. §501(c)(3) because it maintains a racially discriminatory admissions policy which is based on its sincere religious beliefs?

(2) Whether the denial of tax-exempt status to Goldsboro Christian Schools, Inc. under 26 U.S.C. §501(c)(3) solely because it maintains a racially discriminatory admissions policy based on its sincere religious beliefs is an unconstitutional infringement of its guarantees under the Religion Clauses of the First Amendment?

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GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Goldsboro Christian Schools, Inc.,[1] petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 24, 1981.

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[1] In accord with Rule 28.1, Goldsboro Christian Schools, Inc. states that it is a corporation which has no parent company or subsidiary; however, it is an affiliate of the Second Baptist Church of Goldsboro located in Goldsboro, North Carolina.

OPINIONS BELOW

The opinion of the Court of Appeals decided February 24, 1981, is not reported and appears in the Appendix (pp. 1a-3a). The Order of the District Court, entered on September 14, 1977, was reported at 436 F.Supp. 1314 (E.D.N.C. 1977) and appears in the Appendix (pp. 5a-18a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1981. (Appendix p. 53a). By an Order dated April 7, 1981, the Court of Appeals denied the timely Petition for Rehearing and Suggestion of Rehearing In Banc of Goldsboro Christian Schools, Inc. (Appendix p. 55a). This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Sections 501(a) and (c)(3) of the Internal Revenue Code (26 U.S.C. §§501(a) and (c)(3)) provide in pertinent part:

> *Sec. 501. Exemption from tax on corporations, certain trusts, etc.*
>
> (a) *Exemption from taxation.* — An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle. . . .
>
> * * *

(c) *List of exempt organizations.* — The following organizations are referred to in subsection (a):

* * *

(3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Section 3121(b)(8)(B) of the Internal Revenue Code (26 U.S.C. §3121(b)(8)(B)) provides in pertinent part:

Sec. 3121. Definitions.

(b) *Employment.* — For purposes of this chapter, the term "employment" means any service, of whatever nature, performed either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except that such term shall not include—

* * *

(8)(B) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a), . . .

Section 3306(c)(8) of the Internal Revenue Code (26 U.S.C. §3306(c)(8)) provides in pertinent part:

> *Sec. 3306. Definitions.*
>
> *(c) Employment.* — For purposes of this chapter, the term "employment" means . . . (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except—
>
> * * *
>
> (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

The pertinent Treasury Department Regulations, *Treas. Reg.* §1.501(c)(3)-1(d)(3) (26 C.F.R. §1.501(c)(3)-1(d)(3)), provide:

> (3) *Educational defined* — (i) *In general.* The term "educational", as used in Section 501(c)(3), relates to—
>
> (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> (b) The instruction of the public on subjects useful to the individual and beneficial to the community.
>
> An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example (1). An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

STATEMENT OF THE CASE

This action involves the liability of petitioner, Goldsboro Christian Schools, Inc. (the "School"), for Federal Insurance Contribution Act ("FICA") taxes and Federal Unemployment Tax Act ("FUTA") taxes for the years 1969 through 1972. Section 3121(b)(8)(B) of the Internal Revenue Code (the "Code") provides that FICA taxes are not applicable to wages paid to employees for services performed in the employ of an organization described in Section 501(c)(3). Section 3306(c)(8) provides an identical exemption from FUTA taxes. The determination of whether the School is an organization described in Section 501(c)(3) of the Code will resolve the issue of the School's liability for FICA and FUTA taxes for the years in issue. If the School is an organization described in Section 501(c)(3) of the Code, then it is not liable for the taxes. On the other hand, if the School is not such an organization, then it is liable for the FICA and FUTA taxes.

The School was organized in 1963 as a non-profit corporation exclusively for the purpose of operating a private, fundamentalist religious school in Goldsboro, North Carolina. The Second Baptist Church of Goldsboro was instrumental in the School's establish-

ment and has provided both physical facilities and monetary support to the School since its founding. The School's purpose is set forth in Paragraph 3(a) of its Articles of Incorporation as follows:

> The general nature and object of the corporation shall be to conduct an institution or institutions of learning for the general education of *Youth* in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures; combatting all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

During the years at issue, the School maintained a regularly scheduled curriculum, a regular faculty and a regularly enrolled student body for kindergarten and grades one through twelve. The School required each high school student to take one Bible-related course each semester. All classes in the School begin with a prayer. Based on its perception of God's will, the School has maintained a racially discriminatory admissions policy since its founding.

On May 13, 1975, the School filed a suit for refund of FICA and FUTA taxes paid with respect to one employee for the years 1969 through 1972; jurisdiction was conferred upon the District Court by 28 U.S.C.

§1346(a)(1) and 26 U.S.C. §7422. On October 30, 1975, the United States filed an Amended Answer and Counterclaim for unpaid FICA and FUTA taxes for the other employees of the School for the years 1969 through 1972.

On September 14, 1977, the District Court entered an Order on Cross-Motions for Summary Judgment holding that because the School maintained a racially discriminatory admissions policy, the School did not qualify as an organization described in Section 501(c)(3) of the Code; consequently, the School was liable for the FICA and FUTA taxes for the years 1969 through 1972. The District Court assumed for purposes of deciding the Cross-Motions for Summary Judgment that the School's racially discriminatory admissions policy was based on a sincere religious belief.

On January 27, 1978, the parties entered a Stipulation which states in pertinent part:

> The Internal Revenue Service made the decision to abate FICA and FUTA taxes assessed against the [School] for 1969 and most of 1970 because the Internal Revenue Service did not announce the change of its position with regard to the tax-exempt status of private schools which maintain a discriminatory admissions policy until July 10, 1970 and did not begin enforcing this change of position until November 30, 1970.

On May 7, 1980, a Judgment was entered against the School for $116,190.60, plus interest and costs. The School then appealed the Judgment to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals described this case as an "identical twin" to *Bob Jones University* v. *United States,* 639 F.2d 147 (4th Cir. 1980) (Judge Widener

dissenting) (Appendix pp. 19a-51a),[2] and in a *per curiam* opinion affirmed the Judgment entered by the District Court "for the reasons advanced in the *Bob Jones University* case." (Appendix p. 2a). Judge Fields dissented from the *per curiam* opinion.

REASONS FOR GRANTING THE WRIT

Introduction

The School's Petition for Writ of Certiorari should be granted for the following reasons:

1. The questions presented by this Petition, of whether private, religious schools which maintain a racially discriminatory admissions policy based on sincere religious beliefs are precluded from qualifying as tax-exempt organizations under Section 501(c)(3) of the Code, and of whether the denial of tax-exempt status to such organizations is an unconstitutional infringment of First Amendment rights, have never received plenary review by this Court and are of widespread importance. The resolution of these questions will affect every tax-exempt organization, not merely educational organizations which maintain a racially discriminatory admissions policy based on sincere religious beliefs. The decision of the Fourth Circuit in this case would appear to permit the IRS to deny tax-exempt status to any organization which violates some federal public policy sought to be enforced by the IRS. Under the Fourth Circuit's decision, it would appear, for example, that the IRS has the power to deny tax-exempt status to a Catholic supported hospital that refuses to permit abortions to be performed

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[2] Counsel for Bob Jones University has stated to counsel for the School that they intend to apply to this Court by petition for a writ of certiorari in that case.

in its operating rooms based on its sincere religious beliefs because the hospital's policy violates federal public policy as defined in *Roe* v. *Wade,* 410 U.S. 113 (1973). Moreover, this denial of tax-exempt status would not appear, under the Fourth Circuit's decision, to constitute an unconstitutional infringement of the hospital's rights under the Religious Clauses of the First Amendment.

2. Section 501(c)(3) of the Code provides that organizations which are "organized and operated exclusively for religious, charitable . . . or educational purposes" shall be exempt from taxation. The decision of the Fourth Circuit in this case that an "educational" organization must in addition maintain a racially nondiscriminatory admissions policy in order to qualify for tax-exempt status violates numerous well-recognized rules of statutory construction. See *Northwest Airlines, Inc.* v. *Transport Workers Union,* 1980 Oct. Term No. 79-1056, 67 L.Ed.2d 750, 763 (1981); *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307-08 (1961); *National Muffler Dealers Association, Inc.* v. *United States,* 440 U.S. 472, 477 (1979).

3. The Fourth Circuit's decision violates the doctrine of separation of powers by giving judicial approval to the unconstitutional exercise of legislative powers by the IRS, which is simply an administrative agency in the executive branch of government. Only Congress has the power to amend Section 501(c)(3) of the Code to require that educational organizations maintain a racially nondiscriminatory admissions policy in order to qualify for tax-exempt status. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134-35 (1936).

4. The Fourth Circuit's decision ignored this Court's holding in *NLRB* v. *Catholic Bishop of*

Chicago, 440 U.S. 490, 507 (1979), that, in the absence of a clear congressional intent to the contrary, courts should construe statutes in a manner so as to avoid having to resolve "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." There is no evidence of any congressional intent to deny tax-exempt status to educational organizations, like the School, which maintain discriminatory admissions policies which are based on sincere religious beliefs; thus, the Fourth Circuit violated the holding of *NLRB* v. *Catholic Bishop of Chicago* by construing Section 501(c)(3) in such a manner as to raise serious First Amendment issues which the Fourth Circuit then had to resolve.

5. The Fourth Circuit's decision forces the School either to cease practicing its sincere religious beliefs because they are contrary to federal "public policy" as announced by the IRS or to incur a huge tax burden. Such coercion is an unconstitutional infringement of the School's rights under the Free Exercise Clause of the First Amendment. In balancing the competing interests of the School and the IRS, the School's interest in practicing its religious beliefs free from coercion outweighs the governmental interest in eliminating racial discrimination in private, church-related schools because the School's activities do not violate any criminal or regulatory statute.

A. The Decision Below Raises Important And Recurring Questions Concerning The Interpretation Of Section 501(c)(3) Of The Internal Revenue Code Which Have Not Been Settled By This Court

The decision of the Fourth Circuit (Judge Fields dissenting), that the School's racially discriminatory admissions policy which is based on its sincere religious

beliefs precludes the School from qualifying as a tax-exempt educational organization under Section 501(c)(3) of the Code, not only violates well-recognized rules of statutory construction, but more importantly, gives judicial approval to an unconstitutional violation of the doctrine of separation of powers.

Section 501(c)(3) of the Code grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, *or* educational purposes." By use of the word "or," Congress obviously intended to grant tax-exempt status to an organization if it is organized and operated for any one of the purposes enumerated in the statute. The applicable Treasury Department Regulations follow this congressional intent and state that if an organization is organized and operated for any *one* of the purposes enumerated in the statute, then it qualifies for tax-exempt status. *Treas. Reg.* §1.501(c)(3)-1(d).

The IRS concedes that at all relevant times the School satisfied all of the express requirements of Section 501(c)(3) and the applicable Treasury Department Regulations (*Treas. Reg.* §1.501(c)(3)-1(d)(3)) for qualification as a tax-exempt educational organization. Yet despite the clear and unambiguous requirements of Section 501(c)(3), and even though there is no specific language in that statute or its legislative history dealing with racially discriminatory policies of educational organizations, the Fourth Circuit held that the School's racially discriminatory admissions policy which is based on its sincere religious beliefs, precludes it from qualifying as a tax-exempt educational organization because the School's discriminatory policies violate federal "public policy."

The question of the IRS's authority to deny tax-exempt status to an educational organization on grounds of public policy has not received plenary review by this Court. In 1974, when Bob Jones University sought to enjoin the IRS from revoking its tax-exempt status because it maintained a racially discriminatory admissions policy based on its sincere religious beliefs, this Court held that the Anti-Injunction Act (26 U.S.C. §7421(a)) barred the action "without indicating a view as to whether the Service's interpretation [of Section 501(c)(3)] is correct." *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 (1974).[3] In addition, the Fourth Circuit was sharply divided on this issue (Judge Field dissenting in this case and Judge Widener dissenting in the *Bob Jones University* case).

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[3] This Court wrote:

> The question of whether a segregative private school qualifies under §501(c)(3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under §501(c)(3) in *Green* v. *Connally*, 330 F.Supp. 1150 (D.C.) (three-judge court) *aff'd per curiam sub nom. Coit* v. *Green*, 404 U.S. 997 (1971). As a defendant in *Green*, the Service initially took the position that segregative private schools were entitled to tax-exempt status under §501(c)(3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

Bob Jones University v. *Simon*, 416 U.S. 725, 740 n.11 (1974); see also, *Prince Edward School Foundation* v. *United States*, 1980 Oct. Term No. 80-484, 67 L.Ed.2d 376, 376 n.1 (1981) (denial of certiorari) (Rehnquist, J., dissenting).

In addition to the Fourth Circuit's decisions in this case and in *Bob Jones University* v. *United States*, 639 F.2d 147 (4th Cir. 1980), the only other circuit court decision concerning the denial of tax-exempt status to a private school which maintains a racially discriminatory admissions policy is *Prince Edward School Foundation* v. *United States*, No. 79-1622 (D.C. Cir. April 19, 1980) (*per curiam*), *cert. denied*, 1980 Oct. Term No. 80-484, 67 L.Ed.2d 376 (1981) (Justices Stewart, Powell and Rehnquist, dissenting). However, the *Prince Edward School* case did not involve a church-related school whose discriminatory policy was based on a sincere religious belief.

More importantly, the Fourth Circuit in reaching its decision in this case erred in a number of respects. First, the Fourth Circuit failed to analyze the words of the statute, and then further erred by failing to construe the words of the statute in their ordinary everyday sense. This Court has repeatedly held that "in matters of statutory construction it is appropriate to begin with the words of the statute itself," *Northwest Airlines, Inc.* v. *Transport Workers Union,* 1980 Oct. Term No. 79-1056, 67 L.Ed.2d 750, 763 (1981); and that the words of a statute, including revenue acts, should be interpreted where possible in their ordinary, everyday senses. *Malat* v. *Riddell,* 383 U.S. 569, 571 (1966); *Hanover Bank* v. *Commissioner,* 369 U.S. 672, 687 (1962). Since the School maintains a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve, the School qualifies as an "educational" organization under any definition of that word.

Second, the Fourth Circuit erred in adopting the position of the IRS that in order for an "educational" organization to qualify for tax-exempt status under Section 501(c)(3), it must also qualify as a "charitable" organization in the common law sense. Section 501(c)(3) lists several types of organizations which are entitled to tax-exempt status including "educational" organizations and "charitable" organizations. Obviously, the IRS's interpretation of Section 501(c)(3), which was adopted by the Fourth Circuit, makes the term "educational" redundant. In reaching this decision, the Fourth Circuit violated another basic rule of statutory construction which requires that the statute be construed, if possible, to give effect to each word in it and that no part of a statute be interpreted so as to render another part of the statute redundant. *Jarecki* v. *G. D. Searle & Co.,* 367

U.S. 303, 307-308 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

Third, the Fourth Circuit erred by failing to examine the legislative history of Section 501(c)(3) and the vacillating positions taken by the IRS over the years with respect to the tax-exempt status of educational organizations which maintain racially discriminatory admissions policies. This Court has repeatedly held that in considering the validity of an IRS interpretation of a statute, the courts should inquire as to whether the IRS policy sought to be enforced "is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent" *National Muffler Dealers Association, Inc.* v. *United States*, 440 U.S. 472, 477 (1979); and if not, courts should also consider "the consistency of the Commissioner's interpretation and the degree of scrutiny Congress has devoted to the [policy] during subsequent reenactments of the statute." *Ibid. Accord: Rowan Companies, Inc.* v. *United States*, 1980 Oct. Term No. 80-780, 49 U.S.L.W. 4646, 4648 (June 9, 1981).

The exemption from taxation now contained in Section 501(c)(3) originated as a part of the Revenue Act of 1894, 28 Stat. 556, which exempted from taxation all corporations organized and operated for "charitable, religious or educational purposes." This exemption has been expanded from time to time by Congress to include additional categories of organizations.[4] Congress has also

[4] *See, e.g.*, Revenue Act of 1913, 38 Stat. 114 (added "scientific" organizations); Revenue Act of 1918, 40 Stat. 1057 (added organizations "for the prevention of cruelty to children and animals"); Revenue Act of 1921, 42 Stat. 227 (added "literary" organizations and "community chests, funds or foundations"); Internal Revenue Code of 1954, 68A Stat. 163 (added organizations "testing for public safety").

from time to time added restrictions which must be satisfied in order to qualify as a tax-exempt organization.[5] Against the background of numerous amendments to this statutory provision, it is important to note that even though the Thirteenth Amendment (ratified 1865), the Fourteenth Amendment (ratified 1868), the Civil Rights Act of 1866, 14 Stat. 27, and the Civil Rights Act of 1871, 17 Stat. 13, were passed approximately one hundred years before the years at issue in this case, neither Section 501(c)(3), nor any of its predecessor provisions, nor any Treasury Department Regulations promulgated under any revenue act have ever required that an educational organization maintain a nondiscriminatory admissions policy in order to qualify for tax-exempt status.

In fact, prior to 1965, the IRS routinely granted tax-exempt status under Section 501(c)(3) to private schools which maintained discriminatory admissions policies. Then, from 1965 to 1967, the IRS maintained a freeze on Section 501(c)(3) applications of educational organizations with discriminatory admissions policies. On August 2, 1967, the IRS issued a press release stating that if such educational organizations did not receive any unconstitutional state aid, they were entitled to tax-exempt status under Section 501(c)(3). This announced policy remained in effect until July 10, 1970, at which time the IRS issued another press release stating that private schools which maintained racially discriminatory admissions policies no longer qualified for tax-exempt status.

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[5] *See, e.g.*, Revenue Act of 1913, 38 Stat. 114 (required that no part of net earnings of exempt organizations inure to benefit of private individuals or shareholders); Revenue Act of 1934, 48 Stat. 700 (required that no substantial part of the tax-exempt organization's activities involve carrying on propaganda or attempting to influence legislation).

In this case, the IRS initially assessed FICA and FUTA taxes against the School for the years 1969 through 1972, even though the School clearly qualified as a tax-exempt educational organization in 1969 and for most of 1970 under the IRS policy announced on August 2, 1967. Because the School did, in fact, qualify as a Section 501(c)(3) organization under the IRS policy in effect prior to July 10, 1970, the IRS decided to abate the FICA taxes and FUTA taxes assessed against the School for the period prior to November 30, 1970, when the IRS began enforcing the change of position announced in the July 10, 1970 press release.

Consequently, in this case, the IRS has acknowledged that the School qualified as a tax-exempt organization under Section 501(c)(3) of the Code for 1969 and 1970 but the IRS now contends that the School did not qualify as a tax-exempt organization for 1971 and 1972 solely because the IRS — which is simply an administrative agency in the executive branch of government — and *not* the Congress, decided that as of July 10, 1970, the IRS would no longer grant tax-exempt status to schools which maintain discriminatory admissions policies.

The IRS's interpretation of Section 501(c)(3) sought to be enforced in this case was obviously not a contemporaneous construction of the statute by those presumed to be aware of Congress' intent. Moreover, the IRS has not maintained a consistent position with respect to the tax-exempt status of organizations which maintain a discriminatory admissions policy. Thus, the IRS's interpretation of Section 501(c)(3) sought to be enforced in this case is of no probative value in attempting to ascertain Congress' intent in enacting Section 501(c)(3) and the predecessor provisions of prior law.

Fourth, the decision of the Fourth Circuit permitting the IRS to deny the School tax-exempt status on the grounds that the School's admissions policy violates federal public policy gave judicial approval to the unconstitutional exercise of legislative powers by an administrative agency in the executive branch of government.

This Court has consistently refused to permit administrative agencies in the executive branch of government to rewrite the laws enacted by Congress. See, for example, *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134-35 (1936):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law — for no such power can be delegated by Congress — but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. . . .
>
> The *statute* defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. [Emphasis added]

This Court has also repeatedly held that when the language of a statute is clear, the courts do not have the power under the guise of statutory construction to repeal or amend a statute even though they may disagree with the result; rather it is their function to give the natural and plain meaning to the statute as passed by Congress. In *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618, 625-26 (1978), this Court said:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. . . . Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did [years

> ago] . . . but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

The courts must apply statutes as written and they cannot legislate social policy. As this Court wrote in *Evans* v. *Abney,* 396 U.S. 435, 447 (1970):

> The responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

See also *Pillsbury* v. *United Engineering Co.,* 342 U.S. 197 (1952); *United States* v. *Great Northern Railway Co.,* 343 U.S. 562 (1952); *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1951).

Although the Fourth Circuit ignored the doctrine of the separation of powers, Congress has expressed considerable reservation concerning the IRS's authority to deny tax-exempt status to schools which maintain a racially discriminatory admissions policy. In the Ashbrook Amendment to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. 96-74, 93 Stat. 559, Congress prohibited the IRS from using any funds appropriated therein to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church operated schools under Section 501(c)(3) . . . unless in effect prior to August 22, 1978." The House Report on this bill stated in pertinent part:

> This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service procedures ought to be to clarify these laws, not to expand them.

> House Committee on Appropriations, H. R. Rep. No. 96-248, 96th Cong., 1st Sess., at 14-15.

The sponsor of the Amendment, Congressman Ashbrook, argued:

> For the administrative branch to create such a policy without direction from Congress is a violation of the doctrine of the separation of powers.
>
> * * *
>
> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status. . . .
>
> Such policy determinations, when made without the action of Congress, become dangerous encroachments upon congressional authority.
>
> Congressional Record, 96th Cong., 1st Sess., No. 12, June 25, to July 13, 1979, at H. 5879-80.

Although the Ashbrook Amendment does not apply to this litigation because the IRS took action to deny tax-exempt status to the School prior to August 22, 1978 (the effective date of the Ashbrook Amendment), this legislation nevertheless expresses Congress' view that the issue of the tax-exempt status of educational organizations which maintain discriminatory admissions policy is a matter to be resolved by Congress and not by the IRS.

If Congress should determine that educational organizations which maintain racially discriminatory policies should not qualify as tax-exempt organizations described in Section 501(c)(3), then Congress should amend the statute to deny tax-exempt status to such organizations. This is precisely the procedure followed by Congress when it denied tax-exempt status under Section 501(c)(3) to certain Communist organizations on the

grounds of public policy. See Internal Security Act of 1950, 64 Stat. 996 (now codified at 50 U.S.C. §790). The same legislative process should be followed here.

Finally, the decision of the Fourth Circuit in this case conflicts with this Court's decision in *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979). The Fourth Circuit's decision requires the School to maintain a racially nondiscriminatory admissions policy in order to qualify as a tax-exempt organization under Section 501(c)(3). Because the School's admissions policy is based on its sincere religious beliefs, the Fourth Circuit's decision raises serious constitutional questions under the First Amendment Religion Clauses.

In the *Catholic Bishop* case, this Court held that in the absence of a clear congressional intent to the contrary, courts should construe a statute in such a manner so as to avoid having to resolve "difficult and sensitive questions arising out of the guarantees of the First Amendment Religious Clauses." 440 U.S. at 507. The *Catholic Bishop* case is applicable in any situation in which the interpretation of a federal statute creates possible First Amendment conflicts. *See, e.g., St. Martin Evangelical Lutheran Church* v. *South Dakota,* 1980 Oct. Term No. 80-120, 49 U.S.L.W. 4575 (May 26, 1981). The initial determination by the court should not be whether a violation of the First Amendment has, in fact, occurred, but should be whether a violation might occur if a suggested interpretation of the statute is adopted by the court.

In this case, the Fourth Circuit ignored this Court's holding in *Catholic Bishop* by failing to make a threshold examination of the legislative history of Section 501(c)(3) to determine whether Congress intended to deny tax-exempt status to religious schools which main-

tain racially discriminatory admissions policies based on sincere religious beliefs.

The language in Section 501(c)(3) is clear and unambiguous; in fact, the IRS has conceded that the School meets all the express requirements for qualification as a tax-exempt educational organization under Section 501(c)(3) of the Code. Moreover, an examination of the legislative history would have revealed a total absence of any intent on the part of Congress to deny tax-exempt status to religious schools that maintain racially discriminatory policies based on sincere religious beliefs. Instead of making the threshold inquiry required by this Court's holding in *Catholic Bishop*, the Fourth Circuit construed Section 501(c)(3) in a manner so as to create a conflict with the First Amendment Religion Clauses and then immediately proceeded to resolve the competing interests of church and state.

In summary, the decision below in this case contravened several basic rules of statutory construction, sanctioned a violation of the doctrine of separation of powers, and ignored this Court's decision in the *Catholic Bishop* case. Moreover, the question presented by the decision below has never received plenary consideration by this Court and its determination will have far-reaching consequences for all types of organizations seeking to qualify for tax-exempt status under Section 501(c)(3) of the Code. If the Fourth Circuit's decision is not overturned, the IRS will have successfully denied tax-exempt status to the School because it promotes and practices an unorthodox, unpopular, minority belief which the *IRS* — and not Congress — has decided violates federal public policy.

Furthermore, if the IRS has the power to deny tax-exempt status to segregated private schools on the

grounds that the school's admissions policy violates federal public policy, then it would appear, based on the decision of the Fourth Circuit, that the IRS also has the power to deny tax-exempt status to any organization, educational or otherwise, that violates some public policy sought to be enforced by the IRS. For example, if a Catholic hospital refuses to permit abortions to be performed in its operating rooms on the basis of its sincere religious beliefs, does the IRS have the power to deny tax-exempt status to the hospital because its policy on abortions violates federal public policy as defined in *Roe* v. *Wade,* 410 U.S. 113 (1973)?

The federal public policy against employment discrimination (Title VII of the Civil Rights Act of 1964, 78 Stat. 253) is just another example of the potentially far-reaching consequences of the Fourth Circuit's decision in this case. If the IRS were to determine that a school, or any other type of organization described in Section 501(c)(3) of the Code, had violated some provision of Title VII of the Civil Rights Act (even though the organization may have maintained a nondiscriminatory admissions policy), then does the IRS have the power to deny the organization tax-exempt status because the organization violated federal public policy with respect to employment discrimination?

Based on the Fourth Circuit's decision in this case, the answer to the foregoing questions would appear to be yes. Yet, there is absolutely no evidence in the legislative history of Section 501(c)(3) that Congress intended to permit the IRS to determine public policy in this country or that Congress intended to permit the IRS to selectively use the taxing power granted to Congress to enforce those public policies which the IRS, based on its own value judgments, has determined to be worthy of

enforcement. Moreover, if the IRS is permitted to deny tax-exempt status to an organization on the grounds of federal public policy, the end result would be that the specific criteria for determining an organization's tax-exempt status under Section 501(c)(3) would change every time the IRS determines that there has been a change in federal public policy. Thus, subjective and arbitrary judgments by IRS bureaucrats would be substituted for the objective standards enacted by Congress.

B. The Decision Below Raises Important Questions Concerning Petitioners' First Amendment Rights Which Have Not Been Settled By This Court And The Decision Below Conflicts With The Applicable Decisions Of This Court.

The IRS admits that the School's racially discriminatory admissions policy is based on its sincere religious beliefs. The Fourth Circuit's decision which denies tax-exempt status to the School solely because it practices its sincere religious beliefs obviously raises questions concerning an unconstitutional infringement of the School's guarantees under the Religious Clauses of the First Amendment. Assuming *arguendo* that the IRS's interpretation of Section 501(c)(3) of the Code is proper, then the question becomes whether the IRS's denial of tax-exempt status to the School violates its First Amendment rights.

This question is one of first impression for this Court. In *Green* v. *Connally,* 330 F.Supp. 1150, 1169 (D.D.C.) (three-judge court), *aff'd per curiam sub nom. Coit* v. *Green,* 404 U.S. 997 (1971), the District Court wrote:

> "We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-

> deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. Such a problem may never arise; . . .

This case presents exactly the question which was not addressed by the courts in the *Green* litigation.[6]

A decision by this Court on the second question presented by this Petition will affect not only all religious organizations, but also other types of organizations which are organized and operated by religious groups, such as schools, hospitals, orphanages and others. Numerous tax-exempt organizations practice doctrines based on their sincere religious beliefs which might be considered contrary to federal "public policy." For example, because of their sincere religious beliefs, some churches exclude persons from membership on the basis of race. This practice is contrary to federal public policy. Does the IRS have the power to deny tax-exempt status to those churches because their practices violate federal public policy? Another example is the Roman Catholic Church which clearly discriminates on the basis of sex in the employment of clergy by permitting only men to become priests, bishops and archbishops. Does the IRS have the power to deny tax-exempt status to the Roman Catholic Church because its practices violate federal public policy? Even though the IRS has currently limited the public policy requirement to racial discrimination by

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[6] Similarly, this Court has not ruled that organizations like the School are liable under 42 U.S.C. §1981 for racially discriminatory admissions policies which are based on sincere religious beliefs. In *Runyon* v. *McCrary*, 427 U.S. 160, 167 (1976), this Court wrote:

> It is worth noting at the outset some of the questions that these cases do not present. . . . They do not even present the application of §1981 to private sectarian schools that practice *racial* exclusion on religious grounds. (Emphasis in original).

educational organizations, the Fourth Circuit's decision in this case would not appear to prevent the IRS from expanding this requirement to include other types of organizations and other public policies.

The School's racially discriminatory admissions policy is mandated by its perception of God's will. Under the Free Exercise Clause of the First Amendment, it is undisputed that the School's freedom to believe in racial discrimination is not subject to any governmental interference; however, the School's freedom to act according to its beliefs, which is at stake in this case, is necessarily subject to reasonable regulation for certain societal purposes. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940). Under the Free Exercise Clause, this Court must balance the legitimate governmental objectives against private religious interests on the facts of the particular case before it. *Gillette* v. *United States,* 401 U.S. 437, 462 (1971).

Religious practices are subject to regulation only in cases where the government must protect an immediate, clear and compelling interest. *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *Cantwell* v. *Connecticut,* 310 U.S. at 308. Even then, only certain types of governmental interests relating "to the protection of society" have been deemed sufficiently important to outweigh religious freedom:

> The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

Sherbert v. *Verner,* 374 U.S. at 402-03. *Accord: Wisconsin* v. *Yoder,* 406 U.S. 205, 230 (1972). In virtually every case in which this Court has found the governmental interests outweighed the individual First Amendment rights, the religious practice objected to by the govern-

ment has been a crime, or the governmental requirement was not a substantial burden on religious freedom (*e.g.*, requiring a permit to distribute tracts door-to-door). *See* cases cited in Annotation, "Supreme Court Cases Involving Establishment and Freedom of Religion Clauses of Federal Constitution," 37 L.Ed.2d 1147, 1170-79 (1974).

If after balancing the competing interests, the court determines that the government-imposed burden on Free Exercise rights is necessary to achieve some legitimate State objective, then reasonable regulation of religion practice is permitted — but only to the extent necessary to accomplish that legitimate objective. First Amendment freedoms cannot be "burdened", if "the State may accomplish its purpose by means which do not impose such a burden." *Braunfeld* v. *Brown,* 366 U.S. 599, 607 (1961). *Accord: Sherbert* v. *Verner,* 374 U.S. at 406-09; *Shelton* v. *Tucker,* 364 U.S. 479, 488-89 (1960); *Prince* v. *Massachusetts,* 321 U.S. 158, 167 (1944).

The School's interest in the free exercise of its religion, which is at stake in this action, is entitled to protection unless it directly and substantially frustrates some permissible governmental objective, and unless there is no alternative means of achieving that objective which is less burdensome to the School. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963). That the beliefs espoused by the School may be despised, or that it may represent a tiny minority that is out of phase with the times is immaterial. *United States* v. *Ballard,* 322 U.S. 78 (1944).

In balancing the School's rights and the government's objectives, it is undisputed that the School is not attempting to use the First Amendment to shield a crime or a violation of a regulatory statute, or to gain an

economic preference. Likewise, the School's activities pose no direct, immediate or substantial threat to public safety, peace or order.

The IRS's objective is the achievement of racial integration of all educational institutions, public and private. To end discrimination based upon race is a legitimate governmental objective, but this objective is not one in which protection of society is involved. The School's policies, though contrary to the IRS's policy, do not violate any regulatory statute, criminal or civil; moreover, the School's policy, as shown by its existence for almost two decades, is no immediate threat to public safety, peace or order. This is to say that the IRS's legitimate interests are only tangentially involved in this lawsuit. In the past, this Court has refused to allow limitations on Free Exercise rights, except where a criminal or regulatory *statute* has been violated.

On the other hand, the School's sincere religious beliefs dictate its admissions policy, and the action taken by the IRS in this case clearly compels the School to violate its religious beliefs. By denying tax-exempt status to the School, the IRS is imposing a condition upon the availability of tax-exempt status otherwise freely granted to all educational and/or religious institutions. The condition imposed is that the School must cease practicing its discriminatory admissions policy based on its sincere religious belief and publicly advertise the change in local media or else incur a huge tax burden. *See* Rev. Proc. 75-50, 1975-2 C.B. 587 § 3.03. This not only requires the School to violate its beliefs but also holds it open to public embarrassment. The Free Exercise Clause is designed to protect citizens from this type of coercion against practicing their religious beliefs.

The "balance" is clear. The IRS has a remote interest in a generalized goal on the one hand while the plaintiff's very existence is directly at stake because of a tax punishment imposed on it for practicing its sincere religious belief. Under these circumstances, the plaintiff's First Amendment rights must prevail. The Fourth Circuit's decision that the IRS's action does not infringe upon the School's First Amendment rights narrows the scope of religious freedom previously afforded therein. For the first time, the courts have limited the freedoms granted under the Free Exercise Clause of the First Amendment to further a governmental "policy" rather than to enforce a duly-enacted regulatory or criminal statute.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1473

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson. Robert W. Hemphill, Senior District Judge.

Argued December 3, 1980 Decided February 24, 1981

Before BUTZNER, *Circuit Judge*, FIELD, *Senior Circuit Judge*, and MURNAGHAN, *Circuit Judge*.

William G. McNairy, Edward C. Winslow (Claude C. Pierce, John H. Small, Brooks, Pierce, McLendon, Humphrey & Leonard on brief) for Appellant; Leonard J. Henzke, Jr., Tax Division, Dept. of Justice (Michael L. Paup, Tax Division, Miriam R. Eisenstein, Dept. of Justice; M. Carr Ferguson, Assistant Attorney General; James L. Blackburn, United States Attorney on brief) for Appellee.

PER CURIAM:

Goldsboro Christian Schools, Inc., the appellant, on religious grounds denies admission to blacks. The Internal

Revenue Service refused to allow to Goldsboro the exemption provided for under IRC §501(c)(3).[1]

The case also concerned a protest against the IRS requirement that Goldsboro treat the value of free housing provided to teachers as wages subject to income tax withholding and further subject to Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) impositions.

It is rare that any two cases are identical twins. Nevertheless, as it happens, there is identity for present purposes between the instant case and the case of *Bob Jones University* v. *United States,* 639 F.2d 147 (4th Cir. 1980), which has just been handed down. There the taxpayer was held not to be entitled to the §501(c)(3) exemption. In some respects, insofar as decision here is concerned, the resemblance of Goldsboro to Bob Jones University is stronger than would be the case the other way round. That is so since Goldsboro altogether prohibits admission of blacks. The University permits them to enter, but forbids certain interracial associations, especially dating and marriage.

The complete and impeccable treatment by Judge Hall in *Bob Jones University* makes it supererogatory for us to discuss the issue of tax exempt status under §501(c)(3). For that aspect we simply affirm the district court for the reasons advanced in the Bob Jones University case.

There is a secondary contention raised by Goldsboro, to the effect that, even without §501(c)(3) exempt status, it is not obliged to pay or withhold income taxes, FICA taxes or FUTA taxes on lodging furnished to teachers. The claim represents an effort to extend *Central Illinois Public Service*

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[1] 26 U.S.C. §501(c)(3). The section grants tax exemption to "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals,. . . ."

Co. v. *United States,* 435 U.S. 21 (1978), which concerned the nature (taxable or non-taxable) for income tax withholding purposes of meals provided to employees. The reasons why the decision in *Central Illinois* that meals were not taxable as wages is inapplicable to free housing are comprehensively dealt with in the two opinions of the district court, one on cross-motions for summary judgment, the other on a motion for reconsideration. We affirm, as to those aspects of the case, on the opinions of Judge Hemphill. *Goldsboro Christian Schools, Inc.* v. *United States,* 436 F. Supp. 1314 (E.D. N.C. 1977) and U.S.D.C. E.D. of N.C. No. 75-0020-CIV-8 (September 27, 1978). *See also Bob Jones University* v. *United States,* Ct. Cl. No. 553-78 (December 4, 1980).

AFFIRMED.

FIELD, Senior Circuit Judge, dissenting:

I dissent for the reasons stated by Judge Widener in his dissenting opinion in *Bob Jones University* v. *United States,* 639 F.2d 147 (4th Cir. 1980).

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

75-0020-CIV-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff,*

v.

UNITED STATES OF AMERICA, *Defendant.*

Decided September 14, 1977

Before HEMPHILL, *District Judge.*

Order On Cross Motions For Summary Judgment

This is a federal income tax refund suit instituted by plaintiff to recover $3,459.93 in federal withholding, Federal Insurance Contributions Act (F.I.C.A.) and Federal Unemployment Act (F.U.T.A.) taxes paid by plaintiff for the period from 1969 through 1972. Defendant has counterclaimed against plaintiff to recover $160,073.96 in federal taxes in addition to the amounts plaintiff has previously paid.

This case involves three major issues. First, the plaintiff seeks to qualify as an organization exempted from F.I.C.A. and F.U.T.A. taxes. Plaintiff's exemption depends upon whether plaintiff was, during the years in question, an organization described in Section 501(c)(3) of the Internal Revenue Code of 1954, which contains the basic definition of "charitable" organizations which qualify for federal tax benefits. The second issue is whether plaintiff's provision of housing to its teachers constitutes remuneration to the teachers upon which plaintiff is required to withhold and pay employment taxes. The third issue, to be reached only if the second is answered in the affirmative, is the amount of the

remuneration to the employees arising from the provided housing. The record as presently developed contains a sufficiency of undisputed facts to allow a resolution of the first two issues on a motion for partial summary judgment. The third issue is inherently factual and accordingly can only be resolved at trial.

The following material facts have been properly established through discovery and are not in dispute by the parties: Plaintiff was incorporated under the laws of the State of North Carolina in 1963. Its founders desired to provide a private school education in a religious setting, a setting which the founders felt was unavailable in public schools because of, for example, prohibitions against prayer. Consistent with this desire, plaintiff's purpose was set forth in its articles of incorporation as follows (Townsend Affidavit Ex. 22):

> (a) The General nature and object of the corporation shall be to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures; combatting all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testament); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.
>
> This charter shall never be amended, modified, altered, or changed as to the provisions hereinbefore set forth.

The Second Baptist Church of Goldsboro, an independent, fundamentalist institution, figured prominently in plaintiff's establishment, and has continued to figure prominently in its operation. Dr. Ed Ulrich, the pastor of the church from

1948 through 1975, was the prime moving force in plaintiff's establishment. Various members of the congregation were also involved, as were several persons from other churches. Since 1963, the church has provided physical facilities to plaintiff, and has provided plaintiff the services of various church employees (e.g., the pastor, secretary and janitor) without cost.

Since at least 1969, plaintiff has satisfied the State of North Carolina's requirements for secular education in private schools. The submissions to the State indicate that plaintiff requires its high school students to take one Bible-related course during each semester, with the remaining course requirements and offerings having titles suggesting secular subjects. However, regardless of the title of the course, it is plaintiff's practice to begin each class with prayer. This practice is apparently in keeping with plaintiff's overall purpose of providing a secular education in a religious setting.

Since its incorporation, plaintiff has maintained a racially discriminatory admissions policy. That policy, based upon plaintiff's interpretation of the Bible, would seemingly require the exclusion of all noncaucasians. Nevertheless, plaintiff has on occasion accepted noncaucasians; hence, the racially discriminatory admissions policy in fact requires the exclusion of only applicants of the Negro race. For purposes of this motion for partial summary judgment, the court will assume that plaintiff's racially discriminatory admissions policy is based upon a valid religious belief.

Plaintiff never received a determination by the Internal Revenue Service that it was an organization qualifying under Section 501(c)(3) of the Internal Revenue Code of 1954, thereby qualifying for certain tax exemption and other benefits.

Upon audit of the plaintiff's books and records for the years 1969 through 1972, the Commissioner of Internal Revenue (through his duly authorized delegate) determined that the plaintiff was not an organization described in Section 501(c)(3) and, therefore, was an organization required to pay Federal Insurance Contribution Act and Federal Unemploy-

ment Act taxes. The Commissioner, accordingly, determined the amount of those taxes which the plaintiff owed and made assessments accordingly.

Plaintiff employed teachers in the conduct of its business of operating a school and compensated them with salaries. Additionally, some of the teachers were provided residences. The number of residences owned by the plaintiff and provided to its teachers increased from 6 in 1969 to 29 in 1972. The residences were "located either adjacent to the property on which the school is situated or in the immediate vicinity" — i.e., a one-mile radius of the school. In addition to the residences themselves, plaintiff provided the utilities used in these residences.

The bulk of the teachers' actual instructional responsibilities are conducted on the actual school premises. Plaintiff has alleged two teaching responsibilities which could be conducted in the provided residences. First, the teachers could plan their lessons in the residences, although it was a matter of little consequence to plaintiff where the teachers planned their lessons. Second, the teachers could be available in the residences for consultation with the parents of the students, although that could also have been accomplished elsewhere. Apparently there is no requirement that the teachers carry out any teaching responsibility in their residences. Plaintiff makes no distinction between teachers who are provided free housing and teachers who are not provided free lodging vis-a-vis what responsibilities they are either required to or may choose to undertake at their residences.

Upon audit, the Commissioner of Internal Revenue (through his duly authorized delegate) determined that the provision of housing to the teachers constituted additional remuneration to the teachers and, therefore, that plaintiff should have withheld additional income tax from the teachers' salaries, as well as should have paid additional F.I.C.A. and F.U.T.A. taxes with respect thereto. Additional tax liabilities were assessed against plaintiff accordingly.

The initial question presented in this case is whether plaintiff's racially discriminatory admissions policy precludes

it from qualifying as an organization described in Section 501(c)(3), Internal Revenue Code of 1954, which sets forth requirements for qualifying as a so-called charitable corporation entitled to various federal tax benefits, including the exemption from F.I.C.A. and F.U.T.A. taxes here in issue. Determination of this question will decide whether plaintiff was required to pay certain employment taxes during the period from 1969 through 1972. Employers, such as plaintiff, are generally required to pay Federal Insurance Contributions Act (F.I.C.A.) taxes (including the employer's share as well as the employee's share which the employer is required to withhold and pay over) and Federal Unemployment Tax Act (F.U.T.A.) taxes. 26 U.S.C. §§2111, 3101 and 3102. However, employers meeting the description contained in 26 U.S.C. §501(c)(3) are excluded from liability for these taxes. 26 U.S.C. §§3121(b)(8)(B) and 3306(c)(8); see *Bob Jones University* v. *Simon,* 416 U.S. 725, 727 (1974). The issue presented in this case is whether plaintiff is an organization described in Section 501(c)(3), so as to qualify for exclusion from these employment taxes.

The description contained in Section 501(c)(3) controls the qualifications necessary for organizations to receive the various tax benefits conferred upon "charitable" organizations. See *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 29 n. 1 (1976). That description is as follows (Section 501(c)(3):

> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individuals, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

An organization meeting this description is exempt from federal income tax under 26 U.S.C. §501(a)[1], as well as being excluded from other taxes such as the employment taxes in issue here.

Section 501(c)(3) describes qualifying organizations in part here pertinent as entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

The legislative intent behind §501(c)(3) is stated as follows:

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. H.R. Rep. No. 1820, 75th Cong., 3rd Sess. 19 (1939).

In other words the nation as a whole receives a *quid pro quo* by fostering the growth of private institutions which provide worthwhile services to the public.

Since benefit to the public is the justification for the tax benefits, it would be improper to permit tax benefits to organizations whose practices violate clearly declared public policy. It cannot be assumed that Congress intended to confer this encouragement, however indirect, to organizations which actively violate declared national policy. While there is no specific language in the statute to the effect that an organiza-

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[1] 26 U.S.C. 501(a) provides: Exemption from tax on corporations, certain trusts, etc.

Exemption from taxation. — An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

tion satisfying one or more of these qualifying purposes is excluded because its practices violate public policy, this limitation has been held to be inherent in and compelled by both common rules of statutory construction and congressional intent. *Tank Truck Rentals* v. *Commissioner,* 356 U.S. 30 (1958); *Green* v. *Connally,* 330 F.Supp. 1150 (D.C.D.C. 1971) (three-judge court, *aff'd* per curiam sub. nom. *Coit* v. *Green,* 404 U.S. 997 (1971)).

As the court held in *Green* v. *Connally, supra,* private schools maintaining racially discriminatory admissions policies violate clearly declared federal policy and, therefore, must be denied the federal tax benefits flowing from qualification under Section 501(c)(3). Although the Supreme Court's affirmance of the *Green* decision did not constitute a plenary consideration of the issue because of the procedural posture of the case the reasoning of the appellate panel is persuasive and this court has so held previously in *Bob Jones University* v. *Simon,* 396 F.Supp. 597 (D.S.C. 1974).

Basically, the *Green* court held that federal policy, as expressed in the Constitution, in federal statutes, and in decisions of the Supreme Court, would be frustrated by granting the federal tax benefits flowing from qualification under Section 501(c)(3) to educational organizations maintaining racially discriminatory admissions policies. Prominent among the examples of this policy are the Thirteenth and Fourteenth Amendments to the Constitution, the Civil Rights Acts of 1866 and 1871, and 1964, and *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and its legal progency. *See, Green* v. *Connally, supra,* pp. 1163, 1164. Given this clearly declared federal policy against racial bars to educational institutions, it would be at least anomalous and unseemly to confer federal tax benefits (having the purpose and effect of fostering and encouraging the organizations upon whom they are conferred) upon educational institutions which do, in fact, discriminate on racial grounds. Accordingly, Section 501(c)(3) must be read as imposing a general limitation prohibiting qualification for educational organizations that do practice racial discrimination.

Plaintiff also argues that its racially discriminatory admissions policy is based upon religious belief and, therefore, urges that denial of qualification under Section 501(c)(3) violates the First and Fifth Amendments to the United States Constitution. The argument of violation of the First Amendment apparently is that denial of qualification constitutes an impermissible burden upon the free exercise of religious beliefs and/or that the denial of qualification to plaintiff while conferring qualification upon opposing religious beliefs that do not require such discrimination constitutes a prohibited establishment of those opposing beliefs. The Fifth Amendment argument apparently is that a denial of qualification for the tax benefit because of religiously motivated actions is so invidious and devoid of reasonable justification, as to constitute an impermissible deprivation of "life, liberty, and property, without due process of law."

In *Green* v. *Connally, supra* the court specifically declined to reach the merits of the Constitutional issues raised by a discriminatory admissions policy based upon religious belief. 330 F.Supp., p. 1169. The court did note, however (p. 1163), that —

> We are persuaded that there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation.

This language is in keeping with cases which hold that incidental distinctions in government treatment of religions which indirectly arise from the valid exercise of legitimate governmental interest are not prohibited by either the Establishment or the Free Exercise Clauses of the First Amendment.

Perhaps the leading opinion in this area is *Gillette* v. *United States,* 401 U.S. 437 (1971), rehearing denied *sub nom. Negre* v. *Larsen,* 402 U.S. 934 (1971), where the law confer-

red conscientious objector status, a qualification for exclusion from the draft, only upon persons having religious scruples against all wars. Plaintiff argued, *inter alia,* that the First Amendment compelled conscientious objector status to be extended to persons having religious scruples against selective wars. The argument was that, otherwise, the distinction in the statute operated as a *de facto* governmental discrimination against religions which, while not opposed to all wars, might be opposed to selective wars. The court held that the distinction was valid under both the Establishment and the Free Exercise Clauses, for the purpose was grounded in legitimate governmental interests purely secular in nature and the distinction did not have the prohibited effect of establishing a religion. For much the same reason, the court held that the legitimate secular interest avoided any Free Exercise problems. The appropriate test in this area, based upon *Gillette* and *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), is whether (1) there is a secular legislative purpose, (2) the enactment has principal or primary effect which neither enhances nor inhibits religion, and (3) the enactment avoids excessive entanglement with religion. See *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 772-773 (1973); and *Hunt* v. *McNair,* 413 U.S. 734, 741 (1973).

In the present case, there is a legitimate secular purpose for denying tax exempt status to schools generally maintaining a racially discriminatory admissions policy. Moreover, the general across-the-board denial of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion. Finally, the policy patently avoids excessive governmental entanglement with and, in fact, prevents indirect government aid to, religion. Indeed, making qualification under Section 501(c)(3) turn upon whether the organization maintains a policy and practice of excluding one or more races is a reasonably objective standard, whereas the standard the plaintiff proposes to adopt would require, at a minimum, inquiry into the sincerity of the plaintiff's religious beliefs as it impacts upon the admissions policy.

Therefore, the Treasury Department may validly disallow benefits to plaintiff which arise by virtue of qualification as an organization under 26 U.S.C. §501(c)(3) in that plaintiff's policy of racial discrimination is patently violative of the declared public policy of the United States.

The second question for consideration by the court is whether plaintiff's provision of housing to its teachers on the school premises is remuneration to those teachers for purposes of withholding tax and F.I.C.A. and F.U.T.A. As noted in the statements of facts, plaintiff provided free housing and utilities to some of its teachers during the years in question. The Commissioner of Internal Revenue determined that this housing was additional taxable compensation to the teachers and, therefore, that plaintiff should have withheld income taxes from the periodic pay checks for the teachers. The Commissioner also determined that this housing was subject to F.I.C.A. and F.U.T.A. taxes. Tax assessments were made against plaintiff accordingly and plaintiff now contests the determinations resulting in these tax assessments.

For many years, Congress has provided a comprehensive withholding system for the annual income tax which is effectuated through a requirement that the employer withhold from the employee's gross wages an amount sufficient to ultimately pay the employee's income tax liability for the year. See *Graske* v. *Commissioner,* 20 T.C. 418, 420 (1953) and 26 U.S.C. §§3401-3403. The "wages" upon which the employer is required to withhold is defined as "all remuneration * * * for services performed by an employee * * * including the cash value of all remuneration paid in any medium other than cash," with certain exceptions not here pertinent. 26 U.S.C. §3401(a).[2]

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[2] 26 U.S.C. §3401(a) provides: Definitions

(a) Wages. — For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

This sweeping inclusion of "all remuneration" regardless of form is analogous to 26 U.S.C. §61(a)[3], which is the starting point for the computation of the federal income tax. In pertinent part, that section includes in "gross income" (from which various deductions are taken in computing the amount of net income subject to the appropriate tax rate) "all income from whatever source derived, including * * * (1) Compensation for services * * *" Section 61(a) thus requires the inclusion in gross income of all compensation, regardless of whether it is paid in cash or in some other form. 26 C.F.R. §1.61-2 (d)(1). Hence, the provision of lodging as compensation for services rendered is included in the employee's gross income for purposes of computing his tax liability at year end. 26 C.F.R. §1.61-2(d)(3).

26 U.S.C. §119[4] provides a limited exclusion of lodging in certain carefully circumscribed instances. An employee may

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[3] 26 U.S.C. §61(a) provides: Gross income defined

(a) General definition. — Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items. . . .

[4] 26 U.S.C. §119 provides: Meals or lodging furnished for the convenience of the employer

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

exclude the fair value of the lodging received if the following three conditions are met:

1. the lodging must be furnished to him "for the convenience of the employer".

2. the employee must be "required to accept such lodging * * * as a condition of his employment".

3. the lodging must be "on the business premises of his employer".

Since the employee is required, for income tax purposes, to include in gross income the fair rental value of employer-provided housing unless it qualifies under Section 119, the withholding provisions require that the fair rental value of such housing be subject to withholding unless the conditions of Section 119 are met. 26 C.F.R. §31.3401(a)-1(a)(4) and (b)(9). Plaintiff here is thus subject to withholding taxes on the housing it provided its employees unless the housing was provided under the limited conditions set forth in Section 119.

Under the undisputed facts as established by the case, plaintiff cannot meet the requirement that the lodging be furnished on the business premises of the employer. Here, plaintiff's business premises were the school's physical facilities in which the teaching occurred. In point is *Commissioner* v. *Anderson,* 371 F.2d 59 (6th Cir. 1966), *cert. denied* 387 U.S. 906 (1967). There, the taxpayer was employed as the manager of a motel. He was required to be available virtually 24 hours a day. Initially, he was provided a suite of rooms in the motel, but this arrangement proved unsatisfactory. The employer acquired a residential lot two blocks from the motel and constructed a residence on the lot. The taxpayer thereafter resided at the residence under the same conditions as he had resided in the motel. The only question raised was whether the residence was on the motel's business premises.

At the trial level, the Tax Court in *Anderson* applied the "business premises" requirement as meaning only that the property be owned by the employer and be in the vicinity of the property upon which the employer's business was located.

The Court of Appeals reversed the Tax Court, holding that the requirement that the lodging be furnished "on the business premises" meant precisely that, and not "near" the business premises of the employer. Although the court recognized that there might be gray areas in which the residence was so near that it must be considered on the business premises, the court held that *Anderson* was not such a case. Rather, the court applied a test requiring that "a significant portion of his duties" be conducted in the residence.

In reaching this result, the Sixth Circuit relied heavily upon the repudiation of *Anderson* in a case intervening between the Tax Court decision in *Anderson* and the Sixth Circuit's resolution of the appeal in *Anderson*. In *Dole* v. *Commissioner*, 43 T.C. 697 (1965), *aff'd* per curiam on Judge Raum's concurring opinion, 351 F.2d 308 (1st Cir. 1965), the facts were virtually identical. A mill provided some of its employees lodging away from but near the plant property. In a reviewed opinion in the Tax Court, the majority opinion cast doubt upon the Tax Court's prior opinion in *Anderson* and held that the lodging failed to meet the "business premises" requirement. In his concurring opinion, Judge Raum specifically stated that *Anderson* had been incorrectly decided. The Court of Appeals affirmed on the basis of Judge Raum's concurring opinion.

Plaintiff has admitted that all actual teaching responsibilities for which the teachers were hired were conducted on the school premises, and not in the residences. The only job related duties which plaintiff's employees may possibly perform at their residences are class preparations and conferences with the parents of students and it is clear that they are not required chores at such sites. The occasional, noncompulsory performance of work related duties at a residence provided by the employer does not constitute "a significant portion of employee's duties". The housing provided by employer in the present case is not located on the business premises and is not the site of "a significant portion of employee's duties" and

therefore, is not within the exclusion set out in 26 U.S.C. §119.

F.I.C.A. and F.U.T.A. taxes are required to be paid by an employer with respect to "wages" which are defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." 26 U.S.C. §§3121(a) and 3306(b). The Treasury Regulations thus require that F.I.C.A. and F.U.T.A. taxes be paid with respect to all facilities and privileges provided by an employer to an employee unless of small value and offered by the employer merely as a means of promoting the health, good will, contentment or efficiency of his employees. 26 C.F.R. §31.3121(a)-1(f). The regulations then proceed to state that the limited exclusion "does not ordinarly include the value of meals or lodging furnished * * * since generally these items constitute an appreciable part of the total remuneration of such employees." Hence, the fair value for the use of the residences in this case are subject to F.I.C.A. and F.U.T.A. taxes.

Therefore, for the foregoing reasons, defendant's motion for partial summary judgment is granted in its entirety. Plaintiff's motion is denied.

AND IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1215

BOB JONES UNIVERSITY, *Appellee,*

v.

UNITED STATES OF AMERICA, *Appellant.*

No. 79-1216

BOB JONES UNIVERSITY, *Appellee,*

v.

UNITED STATES OF AMERICA, *Appellant.*

No. 79-1293

BOB JONES UNIVERSITY, *Appellee,*

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY AND JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, *Appellants.*

Appeals from the United States District Court for the District of South Carolina, at Greenville.
Robert F. Chapman, District Judge.

Argued: March 3, 1980 Decided: December 30, 1980

Before WIDENER and HALL, *Circuit Judges;* and MERHIGE*, *District Judge.*

Leonard J. Henzke, Jr., Tax Division, Department of Justice (M. Carr Ferguson, Assistant Attorney General, Thomas E. Lydon, United States Attorney; Gilbert E. Andrews, Tax Division, Department of Justice on brief) for Appellant; Wesley M. Walker (J. D. Todd, Jr., O. Jack Taylor, Jr., Natalma M. McKnew, Leatherwood, Walker, Todd & Mann; John C. Stophel, Stophel, Caldwell & Heggie on brief) for Appellee.

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*Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

HALL, Circuit Judge:

Bob Jones University conducts "an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures. . . ."[1] Its religious teachings include a strict prohibition

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[1] As stated in its Preamble, and contained in its Certificate of Incorporation:

> The general nature and object of the corporation shall be to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures, combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel, unqualifiedly affirming and teaching the inspiration of the Bible (both Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the Cross; the resurrection of His body from the tomb; His power to save men from sin; the

against interracial dating and marriage. The admissions and disciplinary policies used to enforce this belief have resulted in the loss of the University's tax exempt status, which we are now asked to review.

Bob Jones University [taxpayer] brought this action to recover Twenty-One Dollars which it paid in 1975 under the Federal Unemployment Tax Act [FUTA].[2] The government counterclaimed for FUTA taxes for the taxable years 1971 through 1975 in the amount of $489,675.59, plus interest. The district court concluded, on both statutory and constitutional grounds, that the IRS was without authority to revoke the University's tax-exempt status. *Bob Jones University* v. *United States,* 468 F.Supp. 890 (D. S.C. 1978). We reverse.

I.

A. The University and its Racial Policies

Bob Jones University was founded in Florida in 1927. It moved to Greenville, South Carolina in 1940 and has been incorporated there as an eleemosynary institution since 1952. Taxpayer is not affiliated with any religious denomination, but maintains a fundamentalist orientation in its educational approach. It is a religious institution in its own right, as well as an educational one.

Taxpayer accepts students from kindergarten through college and graduate school. It enrolls about five thousand students and offers some fifty accredited degrees, in addition to its nondegree Institute of Christian Service. All courses, however, are taught according to Biblical Scripture. Teachers

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new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the Grace of God.

[2] In an earlier action, filed in 1971, taxpayer attempted to enjoin the IRS from revoking its tax exempt status. In *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974), the Supreme Court held that the Anti-Injunction Act of the Internal Revenue Code, 26 U.S.C. §7421(a), prohibited such an action, but suggested the procedure employed here. *Id.* at 746.

are required to be "born again" Christians; students are screened as to their religious beliefs and their conduct is strictly regulated.

Bob Jones University believes that the Scriptures forbid interracial marriage and dating. Prior to 1971, it completely excluded blacks. From 1971 to May, 1975, taxpayer accepted no applications from unmarried black students, with the exception, since 1973, of staff members who had been at the University four years or longer. Following this court's decision in *McCrary* v. *Runyon,* 515 F.2d 1082 (4th Cir. 1975) (reh.den. May 29, 1975), *aff'd* 427 U.S. 160 (1976), prohibiting racial exclusion from private schools, taxpayer revised its policy. After May 29, 1975, unmarried blacks were permitted to enroll, but a disciplinary rule was added to prevent racial intermarriage and dating.

There is to be no interracial dating

1. Students who are partners in an interracial marriage will be expelled.
2. Students who are members of or affiliated with any group or organization which holds as one of its goals or advocates interracial marriage will be expelled.
3. Students who date outside their own race will be expelled.
4. Students who espouse, promote, or encourage others to violate the University's dating rules and regulations will be expelled.

B. The IRS' non-discrimination policy

Prior to 1970, the Internal Revenue Service extended tax exempt status under §501(c) (3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3) to all private schools, regardless of racial policy. In 1970, however, black Mississippi parents and children obtained a preliminary injunction prohibiting the IRS, *pendente lite,* from according tax-exempt status to private schools in Mississippi which discriminated on the basis of race. *Green* v. *Kennedy,* 309 F.Supp. 1127 (D.D.C. 1970).

The IRS later announced nationally that it would no longer allow charitable contributions and deductions, 26 U.S.C. §170(c)(2), and tax exempt status, §501(c)(3), to racially discriminatory schools, including church-related schools.

On June 30, 1971, the three judge district court in *Green* ruled that the issuance of tax exempt status to racially discriminatory private schools was illegal, and issued a permanent injunction enjoining the Commissioner of Internal Revenue from approving tax exempt status to any school in Mississippi that the does not publicly maintain a policy of nondiscrimination. *Green* v. *Connally,* 330 F.Supp. 1150 (D.D.C. 1971). That decision was affirmed by the Supreme Court in *Coit* v. *Green,* 404 U.S. 997 (1971) (per curiam).

Following the *Green* decision, the Service formalized the nondiscrimination policy in several rulings. Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834. The 1972 procedures were superseded in 1975 by Rev. Proc. 75-50, 1975-2 Cum. Bull. 587, *see also* Rev. Rul. 75-231, 1975-1 Cum. Bull. 158 (nondiscrimination requirement for church operated schools). Revenue Procedure 75-50 provides that in order to qualify under section 501(c)(3), a private school must be able to show that all of its programs and facilities are operated in a nondiscriminatory manner.[3]

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[3] In 1979, Congress passed the Treasury, Postal Service and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559.

That Act provides,

> §103. None of the Funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, . . . which would cause the loss of tax exempt status to private, religious, or church operated schools under §501(c)(3) of the Internal Revenue Code of 1954 *unless in effect prior to August 22, 1978.*

(emphasis added). Section 615 of the Act specifically prohibited funding of two proposed revenue procedures, 3830-01-M (44 Fed. Reg. 9451, Feb. 13, 1979) and 4830-01 (43 Fed. Reg. 37296, Aug. 22, 1978).

Bob Jones University is subject to the Revenue procedures prohibiting racial discrimination in private schools. The University is an educational institution as well as a religious one. *See* 26 C.F.R. §1.501(c)(3)-1(d)(3) (educational defined), and the rulings and procedures promulgated by the Service apply to all private schools. We decline to create an exception for religion-based schools where the Service has made none.

We, therefore, must address two questions. Does the IRS have the statutory authority to deny tax exempt status to Bob Jones University because of its racial policies and, if so, does the denial contravene the First Amendment to the Constitution of the United States?

II.

Statutory Authority for the Nondiscrimination Condition

The district court found that the University was entitled to the section 501(c)(3) exemption because "its primary purpose is religious and it exists as a religious institution." 468 F.Supp. at 897. The court reasoned that since the statute and the regulations enumerate seven distinct tax exempt purposes, one of which is "religious," *see* 26 C.F.R. §1.501(c)(3)-(d)(1)(iii), the exemption must be granted once it has been established as a fact that the institution fits one of those enumerated categories.

This simplistic reading of the statute, however, tears section 501(c)(3) from its roots. In *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom Coit*

The effect of the Appropriations Act is clearly prospective and has no effect on the policy as enforced in this case. *See also* 125 Cong. Rec. H 5879, 5882 (daily ed. July 13, 1979) (Rep. Ashbrooke). Rather, it places a moratorium on new procedures, including the proposed procedures cited in section 615. The provision is discussed more comprehensively in Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 Harv. L. Rev. 378 (1979).

v. *Green*, 404 U.S. 997 (1971), a three judge district court held "[t]he code must be construed and applied in consonance with the federal public policy against support for racial segregation of schools, public and private." 330 F.Supp. at 1163.[4] Accordingly, it upheld the application of the IRS's nondiscrimination condition to private schools in Mississippi which practiced racial discrimination. [5]

In that persuasive and scholarly opinion, Judge Leventhal viewed section 501(c)(3) against its background in the law of charitable trusts, concluding that to be eligible under that section, an institution must be "charitable in the broad common law sense,[6] and therefore must not violate public policy. *Green, supra*, 330 F.Supp. at 1156-60.

The legislative history of §501(c)(3) verifies the exemption's foundation in public policy.

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, *and by the benefits resulting from the*

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[4] In *Bob Jones University* v. *Simon, supra*, 416 U.S. at 740 n.11, the Supreme Court indicated that its affirmance of *Green* lacks the precedential weight of a case involving a truly adversary appeal to that court. We think the reasoning of the three judge court below, however, is persuasive and not without precedential weight.

[5] In *Goldboro Christian Schools* v. *United States*, 436 F.Supp. 1314 (E.D. N.C. 1977), the IRS nondiscrimination condition was upheld when applied to a religiously based private school which excluded blacks.

[6] This view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to 501(c)(3), places the separately enumerated purposes in that section under the broad heading of "charitable" and permits deduction of contributions made to organizations serving those purposes. 26 U.S.C. §170(c)(2)(B).

> *promotion of the general welfare.* H.R. Rep. No. 1820, 75th Cong. 3d Sess. 19 (1939). (emphasis added)

Accordingly, it is appropriate that the Service interpreted section 501(c)(3) in a manner that reflects its purpose and history. Moreover, as the *Green* court noted, tax benefits such as deductions and exclusions generally are subject to limitation on public policy grounds. In *Tank Truck Rentals* v. *Commissioner,* 356 U.S. 30 (1958), the Court upheld the service in disallowing the deduction of fines paid for violations of highway weight limits under the "ordinary and necessary" business expense provision of the Code, 26 U.S.C. §162. The allowance of the claimed deduction, the Court held, would frustrate the purpose of the State weight law by diluting the punishment imposed. The court held that the expense could not be deemed a "necessity" if allowing the deduction would frustrate "sharply defined" public policy. 356 U.S. at 33.

Bob Jones University's racial policies violated the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private.

Bob Jones' pre-May 1975 policy excluding unmarried black students violated public policy by subjecting black persons to restrictions which were not imposed on whites. In *Runyon* v. *McCrary,* 427 U.S. 160 (1975), the Supreme Court held, in a non-religious setting, that the equal right to contract provision, 42 U.S.C. §1981, prohibits racial discrimination in non-public school admission policies. Similar considerations apply in a religious setting. In *Bob Jones University* v. *Roudebush,* 529 F.2d 514 (4th Cir. 1979) *affirming Bob Jones University* v. *Johnson,* 396 F.Supp. 597 (D.S.C. 1974), we upheld the denial of Veterans Administration assistance to Bob Jones University and its students under Title VI of the Civil Rights Act, 42 U.S.C. §2000d, because of this policy of excluding unmarried blacks. *See also Norwood* v. *Harrison,* 413 U.S. 455 (1973).

The University's post-May 1975 policy applies equally to both black and white students; nevertheless, it too constitutes racial discrimination. That discrimination on the basis of racial affiliation or companionship is a form of racial discrimination is clear from Equal Protection cases such as *Loving* v. *Virginia,* 388 U.S. 1 (1967) (law prohibiting interracial marriage unconstitutional) and *McLaughlin* v. *Florida,* 379 U.S. 184 (1964) (interracial cohabitation law invalid), as well as §1981 decisions, *see Tillman* v. *Wheaton Haven Recreational Association,* 410 U.S. 431 (1973) (white club member expelled for bringing black guests); *Faraca* v. *Clements,* 506 F.2d 956 (5th Cir. 1975) *cert. denied* 422 U.S. 1006 (1976) (white man denied employment because wife was black).

We think the Service acted within its statutory authority in revoking Bob Jones University's tax exempt status because of these policies.

The University asserts, however, that this situation is special because its racial policies are grounded in sincere religious faith and therefore immutable; with or without the exemption it will maintain its present policy. The district court agreed, finding that the relationship between the exemption and the frustration of public policy against discrimination was too remote to bring the case within the narrow *Tank Truck* exception to deductibility. 468 F.Supp. at 903-04.

This argument misses the mark for two reasons. First, we are not here confronted with a computational provision designed "to tax earnings and profits less expenses and losses." *Tank Truck, supra,* 356 U.S. at 33. Unlike section 162, section 501(c)(3) is rooted in public policy considerations wholly apart from the "broad basic policy of taxing 'net, not * * * gross, income.' " *Id.* (citations omitted) The public policy limitation, therefore, need not be so narrowly applied.

Second, the nondiscrimination policy assures that Americans will not be providing indirect support for any educational organization that discriminates on the basis of

race. *Cf. Norwood* v. *Harrison, supra.*[7] The fact that the religious belief is sincere, and the policy immutable in this case does not obviate the need for a prophylactic rule to prevent such support.

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[7] The grant of tax exempt status to any institution necessarily confers upon it a kind of monetary benefit and constitutes a form of government support. *Walz* v. *Tax Commission,* 397 U.S. 664, 674-75 (1970). The Supreme Court in *Walz* held that a state property tax exemption for religious organizations evidenced a neutrality toward religion, and the level of government support conferred by the exemption was within permissible limits in light of the fact that "either course, taxation . . . or exemption, occasions some degree of involvement with religion." *Id.* at 674. Indirect aid in the form of tax benefits may, in other circumstances, constitute state aid to religion in violation of the Establishment Clause. *Committee For Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973) ("tax credit" to parents sending children to religious school). The basic tax exemption in this case is, on its face, more like that upheld in *Walz,* but the government "neutrality" advanced when such exemptions are granted takes on another aspect when the tax benefit goes to a religion-based school which practices, for whatever reason, racial discrimination.

The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race. *Norwood* v. *Harrison,* 413 U.S. 455 (1973). In *Norwood* the Court remarked that the permissible scope of assistance to racially discriminatory private schools is even narrower than that permitted under the establishment clause — the Constitution is less tolerant of "neutral support" when the underlying effect is to subsidize racial inequality or segregation.

This is not to say that the tax benefit turns the University's policy into government action for Equal Protection Clause purposes. We do think, however, that government must "steer clear" of affording significant tax support to educational institutions that practice racial discrimination.

III.

The First Amendment

Our approval of the government's interpretation of §501(c)(3) brings us to the question whether application of the nondiscrimination policy to Bob Jones University violates the Free Exercise and Establishment clauses of the First Amendment.

A. The Free Exercise Clause

The University contends that the IRS's nondiscrimination policy violates its right to freely practice its religion because it is forced to give up a valuable government benefit in order to practice its religious beliefs. Assuming that the revocation of §501(c)(3) status does impinge upon the University's practice to some extent, *see Sherbert* v. *Verner,* 374 U.S. 398 (1962), the question remains one of balancing — giving due consideration to the weight of the interests asserted by the government and the extent and nature of the burden on the religious practice and the religion as a whole. *See, Wisconsin* v. *Yoder,* 406 U.S. 205 (1972). *See also,* Note, *1981 after Runyon* v. *McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race,* 1977 Duke L.J. 1219, 1240-1266.

The government interest in eliminating all forms of racial discrimination in education is compelling. *See, e.g., Brown* v. *Board of Education,* 347 U.S. 483 (1954). It extends to private action as well as public, *Runyon* v. *McCrary,* 427 U.S. 160 (1975), and has a special vitality where the integration of public schools has made private education attractive to those who would try to turn back the clock.

Government must "steer clear" of any expression of support for racial discrimination in education. *See Norwood* v. *Harrison, supra,* 413 U.S. at 467.

In *Bob Jones University* v. *Roudebush,* 529 F.2d 514 (4th Cir. 1979) (per curiam), *affirming Bob Jones University* v. *Johnson,* 396 F.Supp. 597 (D.S.C. 1974), we recognized that

the government interest in eliminating all racial discrimination in education was sufficiently compelling to justify denial, under Title VI of the Civil Rights Act, of Veterans Administration [V.A.] benefits to Bob Jones University and its students. The policy involved in that case was the same religiously based pre-1965 policy involved here: the denial of admission to unmarried blacks. The district court rejected the University's Free Exercise claim, stating:

> It is clear that the Free Exercise Clause cannot be invoked to justify exemption from a law of general applicability grounded on a compelling state interest.

396 F.Supp. at 607; we affirmed.

In *Goldsboro Christian Schools* v. *United States,* 436 F.Supp. 1314 (D.S.C. 1977), the government's policy of denying tax exempt status to private racially discriminatory schools survived Establishment Clause challenge by a school that excluded blacks because of its religious proscription of racial intermarriage. *See also Green* v. *Connally, supra,* 330 F.Supp. at 1169; *Brown* v. *Dade Christian Schools,* 556 F.2d 310, 314-24 (5th Cir. 1977) (concurring opinion of Judge Goldberg).

The government interest in this case is compelling, when applied to the post-May 1975 policy of strict limitations on racial companionship as well as to the pre-May 1965 policy of excluding unmarried blacks. As discussed in part II, *supra,* the clear federal policy against racial discrimination applies to all forms of racial discrimination — governmental or private, absolute or conditional, contractual or associational.

In contrast, the government's rule would not prohibit the University from adhering to its policy.[8] Abandonment of the policy would not prevent the University from teaching the

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[8] A law which penalizes a person indirectly for practicing his belief may violate the Free Exercise Clause, *Sherbert* v. *Verner,* 374 U.S. 398 (1963). The indirect nature of the "penalty" is, however, a factor to be considered in the balance.

Scriptural doctrine of nonmiscegenation. Nor is any individual student at Bob Jones University forced to personally violate his beliefs; no student is forced to date or marry outside of his race. We think these factors tip the balance in favor of the Services' nondiscrimination doctrine. *See generally,* Note, *Section 1981 after Runyon* v. *McCrary: The Free Exercise Right of Sectarian Schools to Deny Admission To Blacks on Account of Race,* 1977 Duke L.J. 1219; *Racial Exclusion by Religious Schools, Brown* v. *Dade Christian Schools, Inc.,* 91 Harv. L.Rev. 879 (1978).

Comment, *The Tax Exempt Status of Sectarian Educational Institutions That Discriminate on the Basis of Race,* 65 Iowa L.Rev. 258 (1979).

B. The Establishment Clause

The nondiscrimination policy also passes muster under the Establishment Clause. The Establishment Clause requires that a law reflect a secular legislative purpose, have a primary effect that neither advances nor inhibits religion, and avoid excessive entanglement with religion. *Committee for Public Education and Religious Liberty* v. *Regan,* 444 U.S. 646 (1980); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The secular purpose of the rulings in question is unassailable. Taxpayer asserts, however, that the result is both the unconstitutional advancement of certain religions and government excessive entanglement in religious practices.

The district court perceived an Establishment Clause conflict created by the government's denial of tax exemption to religions which would not "stay in step" with expressed federal policy. Thus, it held "the application of the law in the manner which defendant construes it, results in government favoring those churches that adhere to federal policy, more specifically, in this case, those churches whose religious beliefs do not forbid interracial marriage." 468 F.Supp. at 900.

We agree that the Government must maintain an attitude of neutrality toward all religions. *Gillette* v. *United States*, 401 U.S. 437 (1971); *Walz* v. *Tax Commission of New York*, 397 U.S. 664 (1970).[9] But certain governmental interests are so compelling that conflicting religious practices must yield in their favor. Thus the Court has upheld statutes prohibiting polygamy, *Reynolds* v. *United States*, 98 U.S. 145 (1878), or sale of religious materials by minors, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), even though they "favor" religions that do not engage in such practices. In *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), the Court upheld Sunday closing laws, which made the practice of orthodox Jewish merchants' beliefs more expensive "because of the strong state interest in providing one uniform day of rest for all workers." Again, certain religions were "favored," but the First Amendment was not violated.

We respect the district court's concern that religions not be required always to "stay in step with expressed federal policy." The Establishment Clause protects against such intrusion. *Walz, supra* at 674. But the principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied. *See Gillette, supra.*

Finally, the government's rulings do not create the kind of excessive entanglement with religion recently avoided in *National Labor Relations Board* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In *Catholic Bishop*, the Supreme Court held that the National Labor Relations Act did not require Roman Catholic religious schools to permit their lay teachers to hold representation elections, and rejected NLRB jurisdiction over alleged unfair

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[9] *Walz* upheld that New York property tax exemptions for religious organizations, for properties used solely for religious worship, did not violate the Establishment Clause. The *Walz* opinion permits such exemptions but does not require them.

labor practices involving such schools. The Court noted that to hold otherwise would present a significant risk that the First Amendment would be infringed. *Id.* at 504. First, it would often require inquiry into the good faith of the position asserted by the clergy administrators and by the school's religious mission. Second, the Board would be called upon to decide what are "terms and conditions of employment" — an inquiry that would involve the Board in "nearly *everything that goes on in the shcools.*" *Id.* at 503. (emphasis added)

In contrast, the scope of government involvement in this case is much narrower; the only inquiry is whether the school maintains racially neutral policies. And, the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief. *Compare, Brown* v. *Dade Christian Schools, supra.* The provision in question involves minimum intrusion into the operation of the school while serving important government interests.[10]

IV.

In conclusion, we hold that the revocation of Bob Jones University's tax exempt status violates neither the statutory mandate of section 501(c)(3) of the Internal Revenue Code nor the First Amendment to the Constitution of the United States. The judgment of the district court is reversed with instructions to dismiss the University's claim for refund of 1975 FUTA taxes, and to reinstate the government's claim for the years 1971 to 1975 and enter appropriate judgment thereon for plaintiff.

REVERSED AND REMANDED
WITH INSTRUCTIONS

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[10] Taxation itself involves some degree of government involvement, but some degree of involvement is inevitable whether the tax exemption is granted or denied. *Walz, supra,* at 364-65. We do not think the administration of tax laws or the "hazard of churches supporting government" violate the "excessive entanglement" prong of the Establishment Clause.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

While I agree with the result obtained by, and much of the opinion of, the district court, I would decide the case in a somewhat different setting. And I disagree in large extent with the analysis of the majority as well as its result.

To begin with, Bob Jones, which antedates by decades the decision in *Brown* v. *Board of Education*, 367 U.S. 483 (1954), is a "fundamentalist religious organization." *Bob Jones University* v. *Connally*, 472 F.2d 903, 904 (4th Cir. 1973). That has been held in this circuit when the same question now before us was before the court in a tax injunction case, and is confirmed by the extensive and corrective findings of fact of the district court which are summarized just below.

> "Plaintiff is not an educational appendage of a recognized church that may allude in its educational processes to the beliefs of the parent religious order. Instead, the organizational source of plaintiff's religious belief is the university. The convictions of plaintiff's faith do not merely guide its curriculum but, more importantly, dictate for it the truth therein. Bob Jones University cannot be termed a sectarian school, for it composes its own religious order.
>
> "The Court finds that plaintiff's primary purpose is religious and that it exists as a religious organization. The institution also serves educational purposes. The Court further finds that during the year 1975 plaintiff religious organization was organized and operated exclusively for religious and educational purposes." 468 F.Supp. 890 at 895.

Indeed, the Supreme Court in affirming *Bob Jones University* v. *Connally*, supra, stated "The university is devoted to the teaching and propagation of its fundamentalist religious beliefs." *Bob Jones University* v. *Simon*, 416 U.S. 725, 734 (1974).

Accepting the foregoing findings of the district court as correct, and even the majority does not claim they are clearly erroneous, and the previous findings of this court and the Supreme Court, as we must, that Bob Jones University is a religious organization, we are dealing in this case not with the right of the government to interfere in the internal affairs of a school operated by a church, but with the internal affairs of the church itself. There is no difference in this case between the government's right to take away Bob Jones' tax exemption and the government's right to take away the tax exemption of a church which has a rule of its internal doctrine or discipline based on race, although that church may not operate a school at all. In this opinion, I speak not to the abstract wisdom or rightness of such a rule, but to the right of a church to enforce that rule, although it may be repugnant to most of the population, if the rule is a part of its religious doctrine or discipline. The district court found and the government acknowledges that the rule against interracial dating and marriage is a genuine religious belief.

In the case before us, we are immediately dealing only with whether or not Bob Jones' rule forbidding interracial dating and marriage may be enforced without losing its tax exemption.

Briefly, I think the majority, as well as the Internal Revenue Service and the court in *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C. 1971) (Three-judge court), affirmed per curiam *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), misconstrued 26 U.S.C. § 501(c)(3).[1] I would construe § 501(c)(3) to grant Bob Jones University its exemption for

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[1] In *Bob Jones University* v. *Simon*, 416 U.S. 725, 740, n. 11 (1974), the Court indicated that its affirmance of *Green* lacked the precedential weight of a case involving a truly adversary controversy since the Internal Revenue Service adopted the plaintiff's position during the course of the litigation. In view of *Simon*, I do not consider the circuit bound by *Green* when the question is presented, as here, in adversarial context.

"religious" purposes. That being true, there is no reason to test the grant of an exemption for educational purposes, because the exemption for religious purposes has not only the protection of the First Amendment, but its authorization. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), especially pp. 677-680.

To say that there is a *direct* conflict between Bob Jones' First Amendment rights to operate free from government interference and the Fifth Amendment prohibitions against lending financial aid to institutions which practice discrimination, see *Norwood* v. *Harrison*, 413 U.S. 455 (1973), is also not correct in this case. That is so because *Walz* also held that "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the State." p. 675. If it be argued that the holding of *Walz* as to sponsorship was decided in the context of the establishment clause and thus is not applicable here, that holding has been reinforced in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Flagg Bros, Inc.* v. *Brooks*, 436 U.S. 149 (1978). In *Moose Lodge* the court reversed a district court which had canceled the liquor license of Moose Lodge because it refused to serve a drink to a black guest of a member. Its constitution and bylaws limited membership to white males, and the policy and practice was to permit only Caucasian guests on lodge premises. The Court refused to find State action although the club operated with a license from the State of Pennsylvania and the operation of the club was regulated in some particulars by the State. It held that ". . . the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policy of Moose Lodge to make the latter 'State action' within the ambit of the equal protection clause of the Fourteenth Amendment." p. 177. The Court had previously stated that it has ". . . never held, of course, that discrimination by an otherwise private entity would be violative of the equal protection clause if the private entity

receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any degree whatsoever." p. 173. In *Flagg Bros.*, the Court declined to find State action in a warehouseman's proposed sale of goods as permitted by the New York Uniform Commercial Code. The Court ". . . rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement' ". p. 164-165.

Because I feel Bob Jones is entitled to its religious exemption, the only question left is whether the religious exemption, granted by statute, may be revoked by the Revenue Service on the grounds that it is not in accord with public policy. See *Tank Truck Rentals, Inc.* v. *Commissioner,* 356 U.S. 30 (1958). Such questions as the extent of the protection offered Bob Jones by the First Amendment and the extent of the Fifth Amendment prohibition against aiding educational facilities which are not racially integrated come into play as they are expressions of public policy. The question which I cannot avoid, try as I have done to do so, is whether the admitted public policy of the nation favoring freedom of religion as expressed in the First Amendment is to be limited by a public policy assuring ". . . that Americans will not be providing indirect support for any educational organization that discriminates on the basis of race."[2] pp. 152-153. I do not find it necessary to deal with an absolute rule that a church may enforce with impunity any rule of its internal doctrine or discipline, no matter how repugnant, to illustrate by way of exaggeration human sacrifice, for that does not exist here. I think it of more than passing interest, however, that discrimination against women on account of their sex exists in many churches. And the same may be said of racial discrimination, probably to less extent. Yet the churches involved are among the oldest and largest of the Christian faiths

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[2] For the purpose of this opinion, I assume that such a policy exists as phrased by the majority.

in this country. The IRS, however, has not chosen to attack the problem from that angle so as to get it settled for the whole country. Rather, it chose a small, isolated, religious organization, not affiliated with a larger denomination and combined with a school, which espouses a concededly unpopular belief that many think unwise and immoral. Thus, it tries its test case here.

I think it is this court's reading of the statute, and not the district court's, that "tears section 501(c)(3) from its roots." That section's enumeration of exempt purposes is clear and unambiguous. Organizations are exempt which are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." Each of these is a distinct and separate category. By the rules of statutory construction as well as common sense, the word "or" must be read after each of the listed categories. Even the regulations of the IRS are equally unambiguous and follow the construction I think is dictated by the plain words of the statute. 26 C.F.R. § 1.501(c)(3)-1(d)(1)(i) provides an organization may be exempt "if it is organized and operated exclusively for *one or more of the following purposes:*

(a) Religious,
(b) Charitable,
(c) Scientific,
(d) Testing for public safety,
(e) Literary,
(f) Educational, or
(g) Prevention of cruelty to children or animals." (Italics added.)

The regulations also state that "Since *each* of the purposes specified in subdivision (i) of this subparagraph *is an exempt purpose in itself*, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes." 26 C.F.R. § 1.501(c)(3)-1(d)(1)(iii). (Italics added.) All that is necessary, according to both the statute and the regulations promulgated under it is that an organiza-

tion be organized and operated exclusively for one of the named purposes.

The word "charitable" appears in section 501(c)(3) merely as one of the adjectives modifying "purposes." "Charitable" is not used in a generic sense, and is not used as descriptive of the listing of exempt organizations. Rather, "charitable" is itself listed between "religious" and "scientific." It may be, and probably is, because "charitable" is a flexible term, the meaning of which changes to fit a changing society, that Congress specifically exempted certain types of organizations whether or not they qualify as common law charities. See Neuberger & Crumplar, "Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration," 48 *Fordham L. Rev.* 229, 239-40 (1979). But regardless of the reason, the simple fact is that Congress has enumerated certain exempt purposes, including "charitable," "religious," and "educational." It did not grant exemptions by reference to the law of charitable trusts.

Congress, by statute, has provided that certain classes or organizations shall be tax exempt. The district court found as a fact that plaintiff falls within one of those classes. Since that finding is not disturbed, the plaintiff is statutorily entitled to be tax exempt. Neither the IRS nor this court has the power to take away a benefit granted by Congress. The Commissioner may not add a restriction to a statute which is not there, *Commissioner* v. *Acker*, 361 U.S. 87 (1959); nor may he deprive a taxpayer of a benefit conferred by statute, *Brooks* v. *United States*, 473 F.2d 829, 832 (6th Cir. 1973). "The Courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning effect to statutes as passed by Congress." *National Life and Accident Ins. Co.* v. *United States,* 524 F.2d 559, 560 (6th Cir. 1975).

This is a case of first impression so far as the Supreme Court is concerned, as well as the Courts of Appeals. The real

issue I think to be decided, as I have indicated before in this opinion, is whether the public policy favoring freedom of religion as expressed in the First Amendment is to be limited by public policy described by the majority as one meaning that Americans will not provide indirect support for any educational organization that discriminates on the basis of race. To put the question even more properly, may the two policies exist side by side, or is each so rigid that it will not accommodate the other? Assuming that the policy against discrimination on account of race is as broad as stated by the majority, I think it is not so rigid that religious organizations, although they may discriminate, may not exist in the same society. For it is the very existence of the religious organization at stake here, the power to tax involving the power to destroy. *McCulloch* v. *The State of Maryland,* 4 L.Ed. 579, 607 (1819).

In ascertaining what is the public policy of the nation, the Supreme Court has instructed us which are the proper matters to consider in *Twin City Company* v. *Harding Glass Company*, 283 U.S. 353 (1931):

> "In determining whether the contract here in question contravenes the public policy of Arkansas, the Constitution, laws, and judicial decisions of that State and as well the applicable principles of the common law are to be considered. Primarily, it is for the lawmakers to determine the public policy of the State." 283 U.S. at 357.

Because there is no federal common law which applies to the question at hand, we must consider the Constitution, laws, and judicial decisions of the United States. Primarily, we must consider the Acts of Congress.

Those sections of the federal Constitution having application are the First Amendment, of course, and as well the Fourteenth and Fifth Amendments. We consider the First Amendment for its guarantee of religious freedom; the Fourteenth for its guarantee of equal protection of the laws; and the Fifth Amendment as it imposes on the national govern-

ment under its due process clause the same limits, so far as racial segregation goes in public facilities, as are imposed on the States under the equal protection clause of the Fourteenth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

The extent of protection of the First Amendment to religious organizations needs little exposition. It has been called "the transcendent value" in *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1972); and "high 'in the scale of our national values' " in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). And everyone knows the saying, the firstest of the First. In all events, I contend that, with rare exceptions, the freedom of speech, assembly, the press, and religion have always occupied so high a place in the life of the nation that it cannot be doubted that the strongest possible public policy considerations support them. The Fourteenth Amendment also occupies a large place in the scheme of things. Under it *Brown* v. *The Board of Education*, 347 U.S. 483 (1954), was decided with its familiar holding that classification on account of race in the assignment of children to public schools was a violation of the amendment. And that holding has been extended, as we all know, into all fields of State action. Under *Bolling*, supra, the holding of *Brown* is extended to actions by the federal government. There is no doubt, then, that there is a public policy favoring freedom of religion and also no doubt that there is a public policy in opposition to discrimination in matters involving State action. But unless something else appears, nothing has been shown to indicate to me that the two policies may not exist side by side. There is no reason I know of that the policy favoring nondiscrimination is so strong that it will not admit the existence of a religious organization which does in fact discriminiate.

Various statutes of the United States touch on the subject, although none control it directly. Contrary to the majority, I feel that those statutes which throw light on the question are worthy of examination, for, as the Court has said, it is primarily for Congress to determine the public policy of the nation.

Besides the tax exemption statute immediately involved, the various Civil Rights Acts should be considered, as well as the Ashbrook Amendment.

The Civil Rights Act of 1964 outlawed most forms of racial discrimination in this country. Those provisions of the statute relating to employment and public accommodations are probably the most familiar. But that statute did not provide against discrimination in religious organizations, and, indeed, in 42 U.S.C. § 2000a(e) the statute exempted from the public accommodations title "a private club or other establishment not in fact open to the public." Further, 42 U.S.C. § 2000e-1 exempted from the equal employment title of that Civil Rights Act a religious corporation or association "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities." In 1972 Congress amended the equal employment title of the statute to require an employer to reasonably accommodate employees' religious practices if such accommodation does not result in undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j).

42 U.S.C. § 1981, a part of the post-Civil War Civil Rights Acts has been construed in *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975), to prohibit discrimination in private employment; and in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), to prohibit racial discrimination in admission requirements to private secular schools. The statute itself provides, so far as pertinent here, that all persons shall have the same right in every State to make and enforce contracts as is enjoyed by white citizens. *Runyon,* however, specifically did not decide the question of admission to religious schools. 427 U.S. at 167.

The Ashbrook Amendment, P.L. 9674, 43 Stat. 559 § 103, is the most recent expression of Congressional policy touching the question at hand. That amendment to the Appropriations Act provides that none of the funds made available shall be used to carry out any rule, policy, or pro-

cedure which would cause the loss of tax exempt status to private religious or church operated schools under § 501(c)(3) unless in effect prior to August 22, 1978. While the amendment itself is prospective in operation as the majority points out, to say that it has no effect on public policy, I think, is simply wrong. It would be equally as wrong, for example, to say the Civil Rights acts have no place in ascertaining the public policy of the nation just because they are not squarely on point. And the same may be said of the exemptions therefrom. The majority, for example, finds support in 42 U.S.C. § 1981, which I freely admit has a bearing on the case. But if the Ashbrook Amendment has no effect on policy because prospective only, then neither does § 1981 because the rule we are immediately concerned with does not come within its literal terms.

Not only is the Ashbrook Amendment the most recent expression of Congress, it is the only expression of Congress I know of on the question immediately at hand. It is the law of the land, and it has said in unmistakable terms that the IRS is prohibited from doing precisely what it has done here commencing with August 22, 1978. Were it not for its prospective operation, it would bind us here. So, it is worthwhile to look briefly at the legislative history of the Ashbrook Amendment. The House Committee Report provides in part as follows:

> The relevant House Committee report states:
>
> > On August 22, 1978 and February 9, 1978, the Internal Revenue Service proposed a revenue procedure relating to the tax exempt status of private schools. At present the legislative oversight committees of both the House and Senate are considering these proposals. This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of private schools is a matter of far

> reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit. The Appropriations Committee is unsure that the proposed revenue procedures issued by the Service are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them and make the determination that the proposed revenue procedures are a proper expression of the tax laws.
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> House Committee on Appropriations, H. R. Rep. No. 96-248, 96th Cong. 1st Sess., at 14-15.

And Congressman Ashbrook, the sponsor of the Amendment, stated in the Congressional Record, 96th Cong. Ist Sess. No. 12, June 15 - July 13, 1979, at H 5879-80, as follows:

> For the administrative branch to create such a policy without direction from Congress is a violation of the doctrine of the separation of powers.
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> * * *
>
> The Nation's churches and their schools should be free to function without regard to local neighborhood minority mixes or arbitrary "affrmative action" (sic) quota plans. Such Federal overreaching is a violation of the constitutional separation of church and State. Churches and their schools should be free to function without Federal harassment. Citizens should be able to exercise their religious freedom without meddling by the Federal bureaucracy. . . . The IRS has no authority to create public policy.
>
> * * *
>
> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status. . . .

> Such policy determinations, when made without the action of Congress, become dangerous encroachments upon congressional authority. Although the Tax Code has often been termed to be an instrument of social policy, it properly becomes such only upon action or lack of action by the Congress. . . .
>
> For the IRS to select private schools as targets of its own substantive evaluation and tax exemption denial, while leaving unhampered tax-exempt organizations which practice or promote witchcraft, homosexuality, abortion, lesbianism, and euthanasia leaves this Member confused as to the objectives of those who would make this agency into a powerful instrument to selectively implement social policy. . . .
>
> For an agency to permit itself to be guided by pressures of pending legal action, other Federal agencies, outside pressure groups, or changes in an administration is to confuse its own role as tax collector with that of legislator, jurist, or policymaker. There exists but a single responsibility which is proper for the Internal Revenue Service: To serve as tax collector. It is the responsibility of Congress to conduct oversight over this agency to prevent transgressions into legislative authority.

Cong. Rec., 96th Cong. 1st Sess., No. 12, June 25, to July 13, 1979, at H 5879-80.

The cases which I think touch most directly on the question are to large extent a discussion of the constitutional provisions and statutes I have mentioned, and as they are expressions of public policy in the field, I will discuss them as I think they apply in the ascertainment of what is the public policy of the nation with respect to the question now before us.

As I have before pointed out, the Supreme Court has consistently held that the place of First Amendment values in our national order of things is somewhere between transcendent and high. That is emphasized by such cases as

Presbyterian Church v. *Hull Church,* 393 U.S. 440 (1969), in which the Court held, in a dispute over church property but which was decided as a question of church doctrine, that the State of Georgia, even through its court system had no right under the First Amendment to resolve "underlying controversies of religious doctrine." The Court said "Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion — the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." 393 U.S. at 450. Thus, if the courts are forbidden to intrude even to the extent of deciding what is the doctrine of a church, that shows the considerable immunity that church doctrine has from judicial or executive inquiry, much less necessary approval. In *NLRB* v. *Catholic Bishop of Chicago,* supra, the Court held that the National Labor Relations Board could not compel four parochial schools to bargain collectively with a lay teachers union. Although the teachers were within the literal terms of the labor act, the court held that the danger of serious constitutional questions, a conflict between the labor act and the First Amendment, was so great that it construed the labor act to exclude the teachers. Again, in *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), the Court held that those members of the Old Order Amish religion could not be required under compulsory school attendance laws to send their children to school beyond the eighth grade because such violated their religious doctrine.

These cases decided under the First Amendment are sufficient to show the extent of protection offered to religious doctrine and that to overcome this protection requires a considerable showing of a compelling state interest.

Along a different line, the Court held in *Reynolds* v. *United States,* 25 L.Ed. 244 (1879), that the Mormon religious doctrine of taking more than one wife was not sufficient to exempt a conviction under a bigamy statute enacted by Congress which made bigamy a felony punishable by imprison-

ment not to exceed five years, as well as a fine. And, in *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), the Court upheld a fine of the custodian of a child 9 years of age for violating the child labor laws of Massachusetts in that she permitted the child to work in offering for sale publications of Jehovahs Witnesses, the selling of which was a part of the doctrine of the church. In *Reynolds,* the Court considered that religious liberty could not go so far as to "break out into overt acts against peace and good order." 25 L.Ed. at 249. In *Prince,* the Court considered the right of a State to regulate family life to the extent that it protects the welfare of children. Neither of those considerations is present here. Bob Jones has committed no felony, and a State's right to protect the welfare of its children is simply not in the case. Also not in this case is any expression of public policy manifested by a State statute, criminal or otherwise. Neither does a federal statute directly control the subject at hand. Accordingly, while *Reynolds* and *Prince* should be considered in ascertaining what public policy to apply here, they should not be controlling.

Freedom of association also enters into consideration in this case. E.g. *NAACP* v. *Alabama,* 357 U.S 449 (1958). It must be remembered that no one is compelled to go to Bob Jones University. Entrance there is entirely voluntary. It has not and cannot be shown that Bob Jones competes in any significant way with the public schools. Cf. *Norwood* as construed in *Flagg Bros.* at p. 163. As the Supreme Court has said in *Bob Jones University* v. *Simon,* 416 U.S. 725, 735 (1974), "Students and faculty are screened for adherence to certain religious precepts and may be expelled or dismissed for lack of allegiance to them." Thus, if the action of the government in granting an exemption to Bob Jones is enough state action to be considered state aid, then the action of the IRS itself in revoking the exemption on public policy grounds is itself "subject to the closest scrutiny." *NAACP* v. *Alabama,* at p. 461. I acknowledge that the First Amendment right of freedom of association was mentioned by the Court in *Nor-*

wood, which stated that, when manifested by private discrimination, it had never been accorded affirmative constitutional protection accorded the Religious Clauses. And the Court further implied that high on the list of priorities as freedom of association in schools may be, it was not so high as the values inherent in the free exercise clause, p. 469-470. Thus, if Bob Jones were only a school, it might be argued that *Norwood* should control this case providing that tax exemption is equated to free textbooks. I also acknowledge that the holding in *Norwood* may be argued to be that the Fourteenth Amendment prohibition against lending aid to segregated schools is a stronger public policy than freedom of association, nevertheless the right of freedom of association does enter into this case. It is an inescapable part of Bob Jones' background, for, in addition to the First Amendment protections offered to this religious organization in its doctrine and discipline, it has the added protection of the First Amendment protection of freedom of association.

Two other cases bear on the question. The first is *Moose Lodge* v. *Irvin,* 407 U.S. 163 (1972). The next is *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978). In *Moose Lodge,* the Court upheld the right of a Moose lodge in Pennsylvania to racially discriminate in its guests although it operated under a liquor license from the Commonwealth of Pennsylvania and its operation was regulated in some particulars by the State. The Court held that this was not State action. But the importance of the case here is that the grant of a privilege not available to all by the State of Pennsylvania was not enough action by the State to be called State action and be invalid under the Fourteenth Amendment prohibition against actions by States according to racial classification. In *Bakke,* while the Court disapproved the denial of admission of Bakke to medical school on account of his race, the Court further held that the State had a substantial interest in an admissions program "involving the competitive consideration of race and ethnic origin." The Court reversed the California court's judgment which had enjoined any consideration

because of race, p. 320. It suggested that the Harvard College admissions program would be satisfactory. In that program, Harvard believed that admissions taking race into account would keep Harvard from losing a great deal of its vitality and intellectual excellence. Thus, the holding of *Bakke* is clear that a consideration of race is in some circumstances permissible. On whatever ground *Moose Lodge* was decided, its holding is that it is not the public policy of the United States to take the license from a Moose lodge with a segregated guest policy just because it operates under a State license. And that of *Bakke* is equally clear. Race may be taken into account as a factor in admitting students to a state university for reasons having to do with the vitality of the university and intellectual excellence.

Moose Lodge especially, I think, is unanswerable in the public policy context. Can we say in candor that it is more important to the nation to permit a segregated Moose lodge to operate than to permit a segregated religious organization to operate? I think not. *Bakke* is very nearly equally compelling. Can we say that it is more important to a State university to use race as a factor in admitting students to obtain overall vitality and intellectual excellence than to permit Bob Jones to maintain a rule against interracial dating and marriage when that is a part of its religious doctrine? Again, I think not.

The First Amendment, while its values may be transcendent, bends from time to time to accommodate the necessities of society. See *Near* v. *Minnesota,* 283 U.S. 697, 708 (1931). And, as *Reynolds* and *Prince* illustrate, the First Amendment also bends to accommodate threats to public order and the welfare of children. But I think it is a mistake to say that the public policy of not aiding in any way, no matter how indirect, any segregated activity will not yield in any particular to the First Amendment.

While racial quotas are themselves discriminatory, the cases approving them in remedial context in employment cases are too numerous to mention, the most prominent of which, of course, is *United Steelworkers of America, AFL-CIO-CLC*

v. *Weber*, 443 U.S. 193 (1979). So it is not against the public policy of the United States for courts to lend their aid to discrimination in any form, and thus the policy against racial discrimination bends. The Civil Rights Acts themselves contain accommodations for private clubs, §2000a(e); for employment of people of a particular religion by a religious association, §2000e(1); and employees' religious practices which do not result in undue hardship, §2000e(j). It is easily seen that the public policy of no discrimination as provided in the Acts of Congress also is not inflexible. *Weber* itself has construed the Civil Rights Act of 1964 to accommodate racial discrimination. With the Constitution, the statutes, and the decisions of the Supreme Court yielding to the demands of society from time to time, especially including religious demands, a "prophylactic rule to prevent such [state] support," p.153, with no "exception for religion-based schools," p. 150, imposed by the majority, is entirely too inflexible. It places the value of no discrimination protected by the Fourteenth Amendment as a matter of law above the religious protection offered by the First Amendment. I think this is a mistake. Assuming that public policy under the Fourteenth Amendment is correctly stated in the majority opinion, I do not think it is so inflexible that it may not exist side by side with the First Amendment freedoms of the Religious Clauses. I would not deal in such absolutes and would decide only the case before us as is proper in this constitutional setting. *Ashwander* v. *TVA*, 297 U.S. 288, 341 (1936) (Mr. Justice Brandeis concurring). I would decide that Bob Jones University which is a religious institution may continue to operate in its tax exempt status consistently with a rule which may prevent government aid to secular institutions practicing segregation. I see no need to undertake to apply a prophylactic rule especially for ease of administration as the majority opinion implies is one reason for its holding. pp. 154-155.

Although the question of the admission of unmarried black students is more difficult than the rule against racial intermarriage and dating, I would decide that matter the same way for the same reasons I have expressed above.

Because I think the public policy analysis disposes of the case, I would not reach the other questions presented, *Ashwander,* supra, including the very serious question of whether the Revenue Service's revocation of tax exempt status of institutions which do not agree with its idea of public policy is in violation of the establishment clause.

I would thus affirm the judgment of the district court.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1473

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of North Carolina.

Judgment

Filed Feb 24, 1981

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1473

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Order

Filed April 7, 1981

The order of this court filed April 2, 1981, is VACATED.

Upon consideration of appellant's petition for rehearing and suggestion for rehearing en banc, and a rehearing en banc not having received the affirmative vote of a majority of the circuit judges in regular active service,

IT IS ADJUDGED AND ORDERED THAT THE PETITION FOR REHEARING IS DENIED.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Butzner. Judge Field, joined by Judge Widener, would grant rehearing.

For the Court,

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

Joint Appendix

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,

No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Certiorari Granted October 13, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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DOCKET ENTRIES

Proceedings in United States District Court, Eastern District of North Carolina, No. 75-0020-CIV-8

May 13, 1975—Complaint and Summons filed

June 6, 1975—Defendant's Interrogatories and Request for Production filed

July 14, 1975—Plaintiff's Answer to Interrogatories and Request for Production filed

July 24, 1975—Answer filed

October 30, 1975—Defendant's Second Interrogatories and Request for Production filed

October 30, 1975—Amended Answer and Counterclaim filed

November 14, 1975—Reply to Counterclaim filed

December 15, 1975—Plaintiff's Answer to Interrogatories and Request for Production filed

January 28, 1976—Plaintiff's Answer to Interrogatories and Request for Production filed

February 9, 1976—Depositions of Rod Helder and Dr. E. E. Ulrich filed (taken at Goldsboro, North Carolina on January 19, 1976)

October 26, 1976—Defendant's Motion for Partial Summary Judgment filed

January 17, 1977—Plaintiff's Motion for Partial Summary Judgment filed

May 12, 1977—Hearing on Cross-Motions for Summary Judgment

September 14, 1977—Order on Cross-Motions for Summary Judgment filed

January 27, 1978—Stipulation filed

May 7, 1980—Judgment filed

July 2, 1980—Notice of Appeal filed

Proceedings in United States Court of Appeals for the Fourth Circuit, No. 80-1473

July 16, 1980—Case docketed

December 30, 1980—Cause argued before Butzner, Circuit Judge, Field, Senior Circuit Judge, and Murnaghan, Circuit Judge, and submitted

February 24, 1981—Opinion and Judgment filed

March 10, 1981—Petition for Rehearing filed

April 7, 1981—Order Denying Petition for Rehearing filed

April 16, 1981—Order Granting Motion for Stay of Mandate filed

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

Civil Action No. 75-0020-CIV-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

COMPLAINT

(Filed May 13, 1975)

The plaintiff, complaining of defendant, alleges and says:

First Claim for Relief

1.

This is a civil action wherein plaintiff seeks recovery of Federal Insurance Contributions Act taxes and Federal Unemployment Tax Act taxes, interest and penalties, which were illegally, erroneously and wrongfully assessed against and collected from plaintiff under color of the Internal Revenue Laws of the United States. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422.

2.

Plaintiff, Goldsboro Christian Schools, Inc. (hereinafter sometimes referred to as the "School"), is a corporation organized under the North Carolina Non-Profit Corporation Act, having its principal place of business in Goldsboro, Wayne County, North Carolina. Plaintiff is affiliated with and operated as a facility of The Second Baptist Church of Goldsboro.

3.

Defendant is the United States of America.

4.

This action is brought against defendant, the United States of America, for recovery of $1,972.10 of Federal Insurance Contributions Act taxes and interest imposed by Section 3101 and 3111 of the Internal Revenue Code (26 U.S.C. § 3101 and § 3111) and $748.10 of Federal Unemployment Tax Act taxes, interest and penalties imposed by Section 3301 of the Internal Revenue Code (26 U.S.C. § 3301) which were erroneously and illegally assessed against plaintiff for the taxable periods from January 1, 1969, to December 31, 1972, and collected from plaintiff by the District Director of Internal Revenue, Internal Revenue Service, United States of America, for the District of North Carolina, on December 11, 1974.

5.

Under the provisions of Section 3121(b)(8)(B) of the Internal Revenue Code, the Federal Insurance Contributions Act taxes imposed by Section 3101 and 3111 of the Internal Revenue Code are not applicable to wages paid to an employee for "service performed in the employ of a religious, charitable, educational, or other organization described in Section 501(c)(3) which is exempt from income tax under Section 501(a) . . ." unless the employer files a certificate under Section 3121(k)(1)(A) of the Internal Revenue Code, certifying that it desires to have the insurance system established by title II of the Social Security Act extended to service performed by its employees. Similarly, under the provisions of Section 3306(c)(8) of the Internal Revenue Code, the Federal Unemployment Tax Act imposed by Section 3301 of the Internal Revenue Code is not applicable to wages paid to an employee for "service performed in the employ of a religious, charitable,

educational, or other organization described in Section 501(c)(3) which is exempt from income tax under Section 501(a)". Section 501(a) and (c)(3), in pertinent part, provide as follows:

> *Sec. 501. Exemption From Tax on Corporations, Certain Trusts, Etc.*
>
> (a) *Exemption From Taxation.*—An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle. . .
>
> • • •
>
> (c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):
>
> • • •
>
> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

6.

Plaintiff was organized in 1963 as a corporation under the North Carolina Non-Profit Corporation Act, exclusively for the purpose of operating a private, fundamentalistic religious school. Paragraph 3(a) of the Articles of Incorporation reflects its deeply religious nature and purpose:

3. The purposes for which the corporation is organized are:

(a) The general nature and object of the corporation shall be to conduct an institution or institutions of learning for the general education of *Youth* in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures; combatting all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.

7.

At all times herein relevant, the School has maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarden and grades one through twelve. For the 1973-74 school year, the School had a regularly enrolled student body of approximately 750 students. The School draws students from thirteen surrounding counties and operates a fleet of thirty buses which drive an average of 2,200 miles per day transporting students to and from school. The book value of the assets of the School as of June 30, 1974, was $687,018.26.

"Nonpublic" schools in North Carolina, of which plaintiff is one, are required by Section 115-255 of the North Carolina General Statutes to " . . . meet the State minimum

standards as prescribed in the course of study, and the children therein [are required to] be taught the branches of education which are taught to the children of corresponding age and grade in the public schools and such instruction, except courses in foreign languages, [is required to] be given in the English language." In accordance with this statutory requirement, the North Carolina Department of Public Instruction requires that each "nonpublic" school file an annual report with the Department setting forth information about the curriculum, the faculty, the physical facilities of the school, etc., so that the Department can determine whether the school meets the above standards.

Plaintiff has filed the required Kindergarden Annual Report, Elementary School Annual Report, and the Secondary School Annual Report for each of the years in which the Internal Revenue Service has assessed plaintiff for the taxes imposed by the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. The North Carolina Department of Public Instruction notified the School by letter in each of these years that it was in compliance with the requirements of G.S. 115-255 and therefore was an "approved nonpublic school".

8.

All School activities, including classroom instruction, are begun with prayer; all students are required to attend chapel three times a week, and all students are required to take courses in Bible. In addition, the parents of all students are required to sign the following statement in which they agree to cooperate with the religious teachings of the School:

> I agree to cooperate with the School in encouraging my children to follow its Christian teaching, in wholeheartedly entering in all of its programs and work, including the maintaining of discipline and the School's dress and appearance code.

Each teacher of the Goldsboro Christian School is also required to affirm certain religious beliefs. The employment contract which each teacher is required to sign provides, in pertinent part, as follows:

> In accepting a position as ..... teacher in Goldsboro Christian Schools for the ..... school year, I unqualifiedly affirm without any mental reservation what so ever my own personal faith in the Lord Jesus Christ as my Saviour and further affirm my personal belief in the doctrinal position of Goldsboro Christian Schools as stated in the following paragraph of this contract.
>
> I believe in the inspiration of the Bible (both the Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour, Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God.
>
> I understand that Goldsboro Christian Schools is owned by Second Baptist Church and that I am actually an employee of Second Baptist Church. I understand and accept the requirements outlined under item # 10 on the 1974-75 Salary Scale Sheet concerning church membership at Second Baptist Church.
>
> If at any time I can no longer adhere to the statement of faith, I will resign from the school immediately. It is my understanding that the school will not terminate this contract with me during the year unless I fail to adhere to the doctrinal position of the school or consistently in my personal life or in my church relations deviate from standards of conduct generally acceptable

> to Bible believing people or if in my classroom, I fail to maintain good professional and Christian standards as a Christian school teacher. For my part, I will not terminate this contract unless an emergency beyond my control or an act of God requires a change in my plans. If either condition occurs, I will give as much notice as possible.

Paragraph # 10 of the Goldsboro Christian Schools Salary Scale Sheet for 1974-75 provides as follows:

> Baptists moving to Goldsboro to work with Goldsboro Christian Schools will be expected to be members in regular attendance at Second Baptist Church. Employees who are members of churches of another denomination will be expected to be active in a fundamental church of their denomination. If there is no satisfactory church of the employee's own denomination in the area, the employee will be expected to be a regular attendant at Second Baptist Church.

Because of the School's religious beliefs as expressed in its Charter, it has continuously refused to accept funds or grants of any kind from any government, federal, state or local. The School believes that the acceptance of such funds would cause the surrender of its religious principles and infringe upon its right to operate the School in harmony with such principles.

9.

Since the School's inception, its admissions policy has been controlled by its religious belief that God set up racial barriers and that the mixing of the races is contrary to the teachings of the Bible. Based on these religious beliefs, the School does not retain an open admissions policy to blacks or anybody else who would be unwilling to cooperate with the School in its Christian teaching and philosophy. The Statement of Policy adopted by the Board of Trustees of the School provides as follows:

It is the belief of the trustees and administration of Goldsboro Christian Schools that God is the Creator of all men. In the plan and purpose and wisdom of God, He separated mankind into various nations and races bearing distinct physical and emotional characteristics. It is our belief that the plan and purpose of God in the separation of the nations and races should be preserved in the fear of the Lord.

In Goldsboro Christian Schools we would seek to discourage any kind of social intermingling by our students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God. It is our conviction that since such a breakdown is contrary to God's plan, a co-mingling of races leading in this direction can only eventually breed racial disrespect rather than God-fearing racial respect . . . It is for these reasons that Goldsboro Christian Schools does not retain an open admissions policy to blacks or to anybody else who would be unwilling to cooperate with the school in its Christian teaching and philosophy.

• • •

In addition to the problems involved in an open admissions policy, a careful reading of the certificate of compliance with the Civil Rights Act reveals that the school's signature on such a certificate ultimately surrenders the operation of the school to the department of Health, Education and Welfare. No truly Christian board of trustees could rightly authorize such an action to be taken by the school administration. No truly Christian administration could rightly continue to endeavor to lead an institution for God when its policies must ultimately be dictated by a secular bureaucracy in Washington. It is the purpose of Goldsboro Christian Schools to operate only as long as we can be governed alone by the light of the Word of God as God gives us the ability to see that light.

10.

The School is affiliated with and operated as a facility of The Second Baptist Church of Goldsboro. A substantial portion of the funds for the organization of the School came from the members of The Second Baptist Church. The kindergarden and elementary school use the physical facilities of The Second Baptist Church and the land on which the secondary school is located was sold to the School by The Second Baptist Church. The pastor of The Second Baptist Church, Dr. E. E. Ulrich, is the person primarily responsible for the organization of the School. At all times herein relevant, Dr. Ulrich was President of the School and Chairman of its Board of Trustees. Dr. Ulrich is also currently serving as President of the North Carolina Christian Educator's Association.

11.

Under paragraph 4 of the Articles of Incorporation, as amended in 1970, no part of the net earnings of the School inures to the benefit of any private shareholder or individual, and in the event of dissolution, the assets of the School will be distributed for exempt purposes. Paragraph 4 of the Articles of Incorporation provides as follows:

> "4. The corporation shall be a charitable corporation to the extent that no profit will inure to the benefit of any individual and that in case of dissolution, the assets of said corporation shall become the property of the following charitable institutions, share and share alike, to-wit: The Gospel Fellowship Association, Inc. of Greenville, S. C., a non-denominational gospel organization, having a federal tax exempt status, and the Second Baptist Church of Goldsboro, North Carolina, also having a federal tax exempt status".

12.

By reason of the facts hereinabove alleged, plaintiff was organized and operated at all times herein relevant exclusively for religious, charitable or educational purposes. No part of plaintiff's net earnings have or will inure to the benefit of any private shareholder or individual, and no substantial part of its activities involve carrying on propaganda or otherwise attempting to influence legislation. Plaintiff has not and does not participate in or intervene in (including publishing or distributing of statements) any political campaign on behalf of any candidate for public office. Therefore, plaintiff meets all the requirements of an organization described in Section 501(c)(3) of the Internal Revenue Code and the regulations thereunder, and is exempt from income tax under Section 501(a) of the Internal Revenue Code. Plaintiff has not filed a certificate under Section 3121(k)(1)(A) of the Internal Revenue Code certifying that it desires to have the insurance system established by title II of the Social Security Act extended to service performed by its employees. Therefore, the Federal Insurance Contributions Act imposed by Section 3101 and 3111 of the Internal Revenue Code (26 U.S.C. § 3101 and § 3111) and the Federal Unemployment Tax Act taxes imposed by Section 3301 of the Internal Revenue Code (26 U.S.C. § 3301) are not applicable to the wages paid by plaintiff to its employees during the period from January 1, 1969, to December 31, 1972, by the express provisions of Section 3121(b)(8)(B) of the Internal Revenue Code and Section 3306(c)(8) of the Internal Revenue Code.

13.

Nevertheless, the defendant has published certain news releases and Revenue Rulings construing Section 501(c)(3) and stating that private schools, including religious schools such as plaintiff, which do not adopt racially non-discriminatory admissions policies are not an exempt organization

described in Section 501(c)(3) of the Internal Revenue Code and are not exempt from tax under Section 501(a).

In disregard of plaintiff's status as a religious and educational organization, the Internal Revenue Service has erroneously and illegally made the determination that plaintiff is not an organization described in Section 501 (c)(3) of the Internal Revenue Code and is not exempt from tax under Section 501(a) because of its admissions policy; and on October 7, 1974, the Internal Revenue Service erroneously and illegally assessed deficiencies against plaintiff for the taxes imposed by the Federal Insurance Contributions Act, Section 3101 and 3111 of the Internal Revenue Code (26 U.S.C. § 3101 and § 3111), on the taxable wages paid by plaintiff to its employees during the sixteen calendar quarters from January 1, 1969, to December 31, 1972. The total amount of the assessment, including interest, was $101,075.69, computed as follows:

Calendar Quarter	Employee Tax Imposed by Section 3101	Employer Tax Imposed by Section 3111	Interest	Total
1/1/69-3/31/69	$1,287.45	$1,287.45	$ 820.40	$ 3,395.30
4/1/69-6/30/69	972.45	972.45	590.50	2,535.39
7/1/69-9/30/69	870.63	870.63	515.39	2,256.64
10/1/69-12/31/69	2,006.92	2,006.92	1,127.83	5,141.66
1/1/70-3/31/70	2,104.65	2,104.65	1,127.20	5,336.49
4/1/70-6/30/70	1,701.14	1,701.14	853.92	4,256.19
7/1/70-9/30/70	1,559.12	1,559.12	735.86	3,854.10
10/1/70-12/31/70	3,212.85	3,212.85	1,419.99	7,845.68
1/1/71-3/31/71	3,700.08	3,700.08	1,525.55	8,925.70
4/1/71-6/30/71	2,965.55	2,965.55	1,132.77	7,063.87
7/1/71-9/30/71	2,292.69	2,292.69	609.66	5,195.04
10/1/71-12/31/71	4,319.03	4,319.03	1,161.42	9,799.47
1/1-72-3/31/72	4,464.02	4,464.02	1,304.84	10,232.87
4/1/72-6/30/72	3,681.45	3,681.45	964.44	8,327.34
7/1/72-9/30/72	2,939.92	2,939.92	681.98	6,561.82
10/1/72-12/31/72	4,693.47	4,693.47	961.20	10,348.13
		Total Assessment		$101,075.69

On October 7, 1974, the Internal Revenue Service also erroneously and illegally assessed deficiencies against plaintiff for the taxes imposed by the Federal Unemployment Tax Act, Section 3301 of the Internal Revenue Code (26 U.S.C. § 3301), on the taxable wages paid by plaintiff to its employees during 1969, 1970, 1971, and 1972. The total amount of assessment, including interest and penalties, was $33,488.14, computed as follows:

Year	Tax Imposed by Section 3301	Interest	Penalty	Total
1969	$3,000.34	$ 843.05	$ 750.09	$ 4,593.48
1970	4,988.66	1,102.43	1,247.17	7,338.26
1971	7,069.89	1,138.16	1,767.47	9,975.52
1972	8,572.17	865.67	865.67	11,580.88
			Total Assessment	$33,488.14

14.

Deficiencies for Federal Insurance Contributions Act taxes and Federal Unemployment Tax Act taxes, interest and penalties are assessed separately for each employee for each taxable period. Therefore, the assessment for these taxes for each taxable period is divisible and plaintiff's liability therefor is separate as to each individual employee for each taxable period. On December 11, 1974, plaintiff paid the Federal Insurance Contributions Act taxes (including interest) which had been assessed on the taxable wages paid to Rodney Warren Helder, an employee of plaintiff, during the period from January 1, 1969, to June 30, 1969, and on the taxable wages paid to Bernice Gurley Hinnant, an employee of plaintiff, during the period from July 1, 1969, to December 31, 1972. The amount of the Federal Insurance Contributions Act taxes and interest which were paid to the Internal Revenue Service is as follows:

Calendar Quarter	Employee	Employer Tax Imposed by Section 3101	Employee Tax Imposed by Section 3111	Interest	Total
1/1/69-3/31/69	Helder	$57.24	$57.24	$37.62	$ 152.10
4/1/69-6/30/69	Helder	41.92	41.92	26.28	110.12
7/1/69-9/30/69	Hinnant	19.24	19.24	11.78	50.26
10/1/69-12/31/69	Hinnant	55.46	55.46	32.28	143.20
1/1/70-3/31/70	Hinnant	41.00	41.00	22.64	104.64
4/1/70-6/30/70	Hinnant	30.56	30.56	15.96	77.08
7/1/70-9/30/70	Hinnant	25.30	25.30	12.44	63.04
10/1/70-12/31/70	Hinnant	51.34	51.34	23.72	126.40
1/1/71-3/31/71	Hinnant	62.56	62.56	27.04	152.16
4/1/71-6/30/71	Hinnant	56.46	56.46	22.70	135.62
7/1/71-9/30/71	Hinnant	43.42	43.42	16.16	103.00
10/1/71-12/31/71	Hinnant	73.57	73.57	25.60	172.74
1/1/72-3/31/72	Hinnant	73.02	73.02	21.34	167.38
4/1/72-6/30/72	Hinnant	60.36	60.36	17.02	137.74
7/1/72-9/30/72	Hinnant	46.57	46.57	11.74	104.88
10/1/72-12/31/72	Hinnant	77.19	77.19	17.36	171.74
				Total	$1,972.10

On December 11, 1974, plaintiff also paid the Federal Unemployment Tax Act taxes (including interest and penalties) which had been assessed on the taxable wages paid to Rodney Warren Helder during 1969 and on the taxable wages paid to Bernice Gurley Hinnant during 1970, 1971, and 1972. The amount of the Federal Unemployment taxes, interest and penalties which were paid to the Internal Revenue Service is as follows:

Year	Employee	Tax Imposed by Section 3301	Interest	Penalty	Total
1969	Helder	$130.20	$33.85	$32.55	$196.60
1970	Hinnant	119.92	27.70	29.98	177.60
1971	Hinnant	134.40	22.98	33.60	190.98
1972	Hinnant	134.40	14.92	33.60	182.92
				Total	$748.10

15.

On December 11, 1974, and within two years after payment of the taxes set forth in paragraph 14 above, plaintiff timely filed 36 Claims for Refund on Form 843 with the District Director of the Internal Revenue Service in Greensboro, North Carolina, seeking a refund of the Federal Insurance Contributions Act taxes (including interest) and the Federal Unemployment Tax Act taxes (including interest and penalties) which were paid to the Internal Revenue Service by plaintiff on December 11, 1974. Plaintiff set forth in each said Claim for Refund as reason for the allowance thereof the same grounds upon which this suit is based. The type of tax, amount, and period covered by each Claim for Refund was as follows:

A. *Claim for Refund of FICA Taxes Imposed by Section 3101*

Quarter	Employee	Tax	Interest	Total
1/1/69-3/31/69	Helder	$57.24	$18.81	$ 76.05
4/1/69-6/30/69	Helder	41.92	13.14	55.06
7/1/69-9/30/69	Hinnant	19.24	5.89	25.13
10/1/69-12/31/69	Hinnant	55.46	16.14	71.60
1/1/70-3/31/70	Hinnant	41.00	11.32	52.32
4/1/70-6/30/70	Hinnant	30.56	7.98	38.54
7/1/70-9/30/70	Hinnant	25.30	6.22	31.52
10/1/70-12/31/70	Hinnant	51.34	11.86	63.20
1/1/71-3/31/71	Hinnant	62.56	13.52	76.08
4/1/71-6/30/71	Hinnant	56.46	11.35	67.81
7/1/71-9/30/71	Hinnant	43.42	8.08	51.50
10/1/71-12/31/71	Hinnant	73.57	12.80	86.37
1/1/72-3/31/72	Hinnant	73.02	10.67	83.69
4/1/72-6/30/72	Hinnant	60.36	8.51	68.87
7/1/72-9/30/72	Hinnant	46.57	5.87	52.44
10/1/72-12/31/72	Hinnant	77.19	8.68	85.87
		Total Section 3101 Tax		$986.05

B. *Claim for Refund of FICA Taxes Imposed by Section 3111*

Quarter	Employee	Tax	Interest	Total
1/1/69-3/31/69	Helder	$57.24	$18.81	$ 76.05
4/1/69-6/30/69	Helder	41.92	13.14	55.06
7/1/69-9/30/69	Hinnant	19.24	5.89	25.13
10/1/69-12/31/69	Hinnant	55.46	16.14	71.60
1/1/70-3/31/70	Hinnant	41.00	11.32	52.32
4/1/70-6/30/70	Hinnant	30.56	7.98	38.54
7/1/70-9/30/70	Hinnant	25.30	6.22	31.52
10/1/70-12/31/70	Hinnant	51.34	11.86	63.20
1/1/71-3/31/71	Hinnant	62.56	13.52	76.08
4/1/71-6/30/71	Hinnant	56.46	11.35	67.81
7/1/71-9/30/71	Hinnant	43.43	8.08	51.50
10/1/71-12/31/71	Hinnant	73.57	12.80	86.37
1/1/72-3/31/72	Hinnant	73.02	10.67	83.69
4/1/72-6/30/72	Hinnant	60.36	8.51	68.87
7/1/72-9/30/72	Hinnant	46.57	5.87	52.44
10/1/72-12/31/72	Hinnant	77.19	8.68	85.87
		Total Section 3111 Tax		$986.05

C. *Claim for Refund of Federal Unemployment Tax Imposed by Section 3301*

Year	Employee	Tax	Interest	Penalty	Total
1969	Helder	$130.20	$33.85	$32.55	$196.60
1970	Hinnant	119.92	27.70	29.98	177.60
1971	Hinnant	134.40	22.98	33.60	190.98
1972	Hinnant	134.40	14.92	33.60	182.92
			Total Section 3301 Tax		$748.10

The aggregate amount of all Claims for Refund in A, B, and C above was $2,720.20.

On December 11, 1974, plaintiff also filed 36 claims in Abatement on Form 843 with the District Director of the Internal Revenue Service in Greensboro, North Carolina, requesting abatement of the Federal Insurance Contributions Act taxes and Federal Unemployment Tax Act taxes, interest and penalties which were illegally and erroneously assessed against plaintiff as set forth in paragraph 13 above less the amount of Federal Insurance Contributions Act taxes and Federal Unemployment Tax Act taxes which were paid to the Internal Revenue Service as set forth in paragraph 14 above. The aggregate amount of all such Claims in Abatement was $132,042.26. Plaintiff set forth in each said Claim in Abatement as reasons for the allowance thereof the same grounds upon which this suit is based.

16.

On December 30, 1974, the Director of the Service Center for the Southeast Region mailed to plaintiff, by Certified Mail, a formal notice of disallowance of each of the above Claims for Refund for Federal Insurance Contributions Act taxes and interest, and for Federal Unemployment Tax Act taxes, interest and penalties. As of the filing of this Complaint, the Claims in Abatement have not been acted on by the Internal Revenue Service.

17.

Section 501(c)(3) of the Internal Revenue Code and the regulations thereunder set forth certain criteria for tax exempt status, none of which involves the admissions policy of exempt organizations carrying out educational and religious activities. The defendant does not have the authority to require that plaintiff maintain a racially open admissions policy in order to qualify as an organization exempt from tax under Section 501(c)(3) and 501(a) of the Internal Revenue Code. Any change in the requirements of an organization described in Section 501(c)(3) of the Internal

Revenue Code must come from Congress, not the Executive Branch. Furthermore, defendant's attempt to require that private religious schools maintain an open admissions policy in order to qualify for tax exempt status under Section 501(c)(3) and 501(a) of the Internal Revenue Code violates plaintiff's rights under the First and Fifth Amendments of the Constitution of the United States.

18.

By reason of the facts hereinabove alleged, the wages paid by plaintiff to its employees during the period from January 1, 1969, to December 31, 1972, were not subject to the Federal Insurance Contributions Act taxes imposed by Section 3101 and 3111 of the Internal Revenue Code and Federal Unemployment Tax Act taxes imposed by Section 3301 of the Internal Revenue Code. Accordingly, plaintiff has overpaid its liability for the aforesaid taxes by the amount of $2,720.20 for the period from January 1, 1969, to December 31, 1972; and the defendant has erroneously and illegally collected from the plaintiff the sum of $2,720.20 contrary to the applicable provisions of the Internal Revenue Laws.

19.

By reason of the facts hereinabove alleged, the defendant, the United States of America, is indebted to plaintiff in the principal sum of $2,720.20 together with interest thereon from December 11, 1974, until paid.

Second Claim for Relief

1.

This is a civil action wherein plaintiff seeks recovery of withholding income taxes and interest which were illegally, erroneously and wrongfully assessed against and collected from plaintiff under color of the Internal Revenue Laws of the United States. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422.

2.

All of the allegations contained in paragraphs 2 and 3 of the First Claim for Relief are restated and incorporated herein by reference.

3.

This action is brought against defendant, the United States of America, for recovery of $739.73 of withholding income taxes and interest which were erroneously and illegally assessed against plaintiff under Section 3403 of the Internal Revenue Code (26 U.S.C. § 3403) for the 16 calendar quarters from January 1, 1969, to December 31, 1972, and collected from plaintiff by the District Director of Internal Revenue, Internal Revenue Service, United States of America, for the District of North Carolina, on December 11, 1974.

4.

All of the allegations contained in paragraphs 6-10 of the First Claim for Relief are restated and incorporated herein by reference.

5.

Plaintiff owns a number of houses which are located either adjacent to the property on which the School is situated or in the immediate vicinity thereof. Plaintiff believes that in order to successfully operate a Christian day school and to accomplish the objectives of the School set forth in the charter provision quoted above, that the faculty of the School must live on the business premises of the School. Accordingly, each new teacher who moves to Goldsboro is required to live in School housing as a condition of employment. Section 5 of the employment contract used by the School provides as follows:

> The policy of Goldsboro Christian Schools is to require teachers moving to Goldsboro, as employees of the school, to live in school provided housing for which

there is no charge. Because we recognize that your housing is school provided and necessary to your work, we are also providing all utilities including one telephone in each residence. In regards to the telephone, we will not pay for long distance calls unless authorized by the school; we will expect the telephone to be listed in the directory; extension phones would be paid by the employee.

Since the School believes that unless a faculty member lives in School housing he will be unable to successfully perform the services required of him, only those teachers who were long-time residents of Goldsboro and who owned a home in Goldsboro at the time of their application for a teaching position are exempt from the requirement of living in School housing. The School makes no adjustment or distinction in its salary schedule for those teachers who live in School housing and for those who do not.

6.

Based on the foregoing facts, the alleged value of lodging furnished to certain employees of the School during the period from January 1, 1969, to December 31, 1972, is excludable from gross income under Section 119 of the Internal Revenue Code (26 U.S.C. § 119) because:

(a) the lodging is furnished on the business premises of the employer,

(b) the lodging is furnished for the convenience of the employer, and

(c) the employee is required to accept such lodging as a condition of his employment.

Accordingly, the Form 941 which was filed by plaintiff with the Internal Revenue Service for each of the 16 calendar quarters from January 1, 1969, to December 31, 1972, did

not include as part of the wages paid to each employee the alleged value of lodging furnished by plaintiff.

7.

The Internal Revenue Service illegally and erroneously determined that the alleged value of lodging furnished by plaintiff to certain employees of the School was not excludable from their gross income under Section 119 of the Internal Revenue Code; and on October 7, 1974, the Internal Revenue Service erroneously and illegally assessed a deficiency against plaintiff under Section 3403 of the Internal Revenue Code for the income taxes required to be withheld under Section 3402 on the alleged value of lodging furnished to certain employees of the School during the 16 calendar quarters from January 1, 1969, to December 31, 1972. The total amount of the assessment, including interest, was $28,970.05, computed as follows:

Quarter	Section 3403 Tax	Interest	Total
1/1/69-3/31/69	$ 464.43	$147.98	$ 612.41
4/1/69-6/30/69	411.13	124.83	535.96
7/1/69-9/30/69	506.87	150.02	656.89
10/1/69-12/31/69	662.47	186.15	848.62
1/1/70-3/31/70	699.91	179.39	879.30
4/1/70-6/30/70	645.44	162.00	807.44
7/1/70-9/30/70	916.04	216.17	1,132.21
10/1/70-12/31/70	1,054.77	233.09	1,287.86
1/1/70-3/31/71	1,175.08	242.24	1,417.32
4/1/71-6/30/71	1,132.53	216.29	1,348.82
7/1/71-9/30/71	1,916.69	534.62	2,451.31
10/1/71-12/31/71	2,938.42	702.23	3,640.65
1/1/72-3/31/72	2,913.87	425.86	3,339.73
4/1/72-6/30/72	2,730.87	357.71	3,088.58
7/1/72-9/30/72	3,071.26	356.22	3,427.48
10/1/72-12/31/72	3,170.79	324.68	3,495.47
		Total Assessment	$28,970.05

8.

Deficiencies for income taxes required to be withheld by an employer under Section 3402 of the Internal Revenue Code on wages paid to employees are assessed separately for each employee for each taxable period. Therefore, the total assessment against plaintiff for withholding taxes for each taxable period is divisible and plaintiff's liability therefor is separate as to each individual employee for each taxable period.

On December 11, 1974, plaintiff paid the withholding taxes (including interest) assessed under Section 3403 of the Internal Revenue Code on the alleged value of lodging furnished to Rodney Warren Helder, an employee of plaintiff, during the period from January 1, 1969, to June 30, 1969, and on the alleged value of lodging furnished to Bernice Gurley Hinnant, an employee of plaintiff, during the period from July 1, 1969, to December 31, 1972. The amount of withholding taxes and interest which were paid to the Internal Revenue Service is as follows:

Quarter	Employee	Tax Imposed by Section 3403	Interest	Total
1/1/69-3/31/69	Helder	$31.50	$10.35	$ 41.85
4/1/69-6/30/69	Helder	31.50	9.88	41.38
7/1/69-9/30/69	Hinnant	16.18	4.95	21.13
10/1/69-12/31/69	Hinnant	31.07	9.04	40.11
1/1/70-3/31/70	Hinnant	32.85	9.07	41.92
4/1/70-6/30/70	Hinnant	28.85	7.53	36.38
7/1/70-9/30/70	Hinnant	36.40	8.95	45.35
10/1/70-12/31/70	Hinnant	33.90	7.83	41.73
1/1/71-3/31/71	Hinnant	33.89	7.33	41.22
4/1/71-6/30/71	Hinnant	29.54	5.94	35.48
7/1/71-9/30/71	Hinnant	45.04	8.38	53.42
10/1/71-12/31/71	Hinnant	53.54	9.15	62.69
1/1/72-3/31/72	Hinnant	51.65	7.55	59.20
4/1/72-6/30/72	Hinnant	46.75	6.59	53.34
7/1/72-9/30/72	Hinnant	57.70	7.27	64.97
10/1/72-12/31/72	Hinnant	53.90	6.06	59.96
			Total	$739.73

9.

On December 11, 1974, and within two years after payment of the taxes set forth in paragraph 8 above, plaintiff timely filed 16 Claims for Refund on Form 843 with the District Director of the Internal Revenue Service in Greensboro, North Carolina, seeking a refund of the withholding taxes (including interest) which were paid to the Internal Revenue Service by plaintiff on December 11, 1974. Plaintiff set forth in each said Claim for Refund as reasons for the allowance thereof the same grounds upon which this suit is based. The amount and period covered by each Claim for Refund was as follows:

Quarter	Employee	Tax	Interest	Total
1/1/69-3/31/69	Helder	$31.50	$10.35	$ 41.85
4/1/69-6/30/69	Helder	31.50	9.88	41.38
7/1/69-9/30/69	Hinnant	16.18	4.95	21.13
10/1/69-12/31/69	Hinnant	31.07	9.04	40.11
1/1/70-3/31/70	Hinnant	32.85	9.07	41.92
4/1/70-6/30/70	Hinnant	28.85	7.53	36.38
7/1/70-9/30/70	Hinnant	36.40	8.95	45.35
10/1/70-12/31/70	Hinnant	33.90	7.83	41.73
1/1/71-3/31/71	Hinnant	33.89	7.33	41.22
4/1/71-6/30/71	Hinnant	29.54	5.94	35.48
7/1/71-9/30/71	Hinnant	45.04	8.38	53.42
10/1/71-12/31/71	Hinnant	53.54	9.15	62.69
1/1/72-3/31/72	Hinnant	51.65	7.55	59.20
4/1/72-6/30/72	Hinnant	46.75	6.59	53.34
7/1/72-9/30/72	Hinnant	57.70	7.27	64.97
10/1/72-12/31/72	Hinnant	53.90	6.06	59.96
			Total	$739.73

On December 11, 1974, plaintiff also filed 16 Claims in Abatement on Form 843 with the District Director of the Internal Revenue Service in Greensboro, North Carolina, requesting abatement of the withholding taxes and interest

as set forth in paragraph 7 above which were illegally and erroneously assessed against plaintiff under Section 3403 of the Internal Revenue Code less the amount of withholding taxes which were paid to the Internal Revenue Service as set forth in paragraph 8 above. The aggregate amount of all such Claims in Abatement was $28,010.56. Plaintiff set forth in each said Claim in Abatement as reasons for the allowance thereof the same grounds upon which this suit is based.

10.

On December 30, 1974, the District Director mailed to plaintiff, by Certified Mail, a formal notice of disallowance of each of plaintiff's 16 Claims for Refund of withholding taxes and interest. As of the filing of this Complaint, the Claims in Abatement have not been acted on by the Internal Revenue Service.

11.

By reason of the facts hereinabove alleged, the alleged value of lodging furnished by plaintiff to Mr. Helder and Mrs. Hinnant during the 16 calendar quarters from January 1, 1969, to December 31, 1972, is excludable from their gross income under Section 119 of the Internal Revenue Code. Accordingly, plaintiff has overpaid its liability for withholding taxes on the alleged value of said lodging under Section 3403 of the Internal Revenue Code in the amount of $739.73 for the 16 calendar quarters from January 1, 1969, to December 31, 1972; and defendant has erroneously and illegally collected from plaintiff the sum of $739.73 contrary to the applicable provisions of the Internal Revenue Laws.

12.

By reason of the facts hereinabove alleged, the defendant, the United States of America, is indebted to plaintiff in the principal sum of $739.73 together with interest thereon from December 11, 1974, until paid.

WHEREFORE, plaintiff demands judgment against defendant in the amount of Three Thousand Four Hundred Fifty-Nine and 93/100 Dollars ($3,459.93) with interest thereon from the date of payment of same as provided by law, and the cost of this action, and such other and further relief as the Court may deem proper.

/s/ CLAUDE C. PIERCE
Claude C. Pierce

/s/ WILLIAM G. MCNAIRY
William G. McNairy

/s/ EDWARD C. WINSLOW III
Edward C. Winslow III
Attorneys for Plaintiff

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/s/ JOHN E. DUKE
John E. Duke

Of Counsel:

DUKE AND BROWN
213 East Walnut Street
Goldsboro, North Carolina 27530
Telephone: 734-6500

Verification

I, Edward E. Ulrich, being first duly sworn, depose and say that I am Chairman of the Board of Trustees of Goldsboro Christian Schools, Inc., Plaintiff, that I have read the foregoing Complaint and know the contents thereof and the same to be true of my own personal knowledge, except as to those matters therein stated upon information and belief and as to those matters I believe the same to be true.

/s/ EDWARD E. ULRICH
Edward E. Ulrich

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

DEFENDANT'S INTERROGATORIES AND REQUESTS FOR PRODUCTION

(June 3, 1975)

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, the defendant requests that the plaintiff answer the following interrogatories and produce the requested documents. The plaintiff may satisfy the requests for production by serving copies of the requested documents upon counsel for the defendant at the same time as filing answers to the interrogatories. In lieu thereof, the defendant requests that the plaintiff produce the documents at the office of the United States Attorney, 310 New Bern Avenue, Raleigh, North Carolina, on July 14, 1975, at 9:30 a.m., or at such other time and place as may be agreed upon between counsel for the plaintiff and counsel for the defendant.

All interrogatories and requests for production refer to the entire period of the plaintiff's existence since its incorporation in 1963. All references to the "School" are to the Goldsboro Christian Schools, Inc. (or its legal predecessor or successor corporations).

1. Provide the School's corporate charter, the By-Laws, and all amendments to each.

2. State the name and current address of the ten persons most active or instrumental in the establishment of the School.

3. State whether establishment of the School was in any way related to actions, proposed actions, or expected actions by any governmental body. If so, state the nature of the actions, proposed actions, or expected actions, and

how the establishment of the School was expected by the founders to affect those actions.

4. Provide the names and current addresses of all persons serving on the Board of Trustees of the School, and state the dates that each person served on the Board.

5. Provide all minutes, memoranda, and other written or printed material reflecting meetings and actions of the Board of Trustees of the School.

6. Does the School have any governing body other than the Board of Trustees? If so, state the nature of the body and provide the names and current addresses of each member of the body. Also provide all minutes, memoranda, and other written or printed material reflecting actions of the body.

7. Provide all reports and other written submissions made by the School to the North Carolina Department of Public Instruction.

8. Provide all literature, prospectuses, brochures, correspondence, and other written or printed material reflecting student admission requirements and limitations.

9. Provide copies of all statements or agreements that parents and/or pupils are required to enter as a condition for admission to the School.

10. If there are any unwritten agreements or understandings between the School and parents and/or students, state the nature of each such agreement or understanding.

11. With respect to the plaintiff's allegations as to "racial barriers" (e.g., complaint, paragraph 9), provide the following:

a. the plaintiff's definition of race, and a list of each distinguishable group meeting the plaintiff's definition as a separate race;

b. a detailed statement of the "racial barriers" that exist between racial groupings identified in answer-

ing a, above, addressing specifically (1) the levels or generic categories of commerce (in its broad sense) wherein dealings may not be had between the races, and (2) the levels or generic categories of commerce (in its broad sense) wherein dealings may be had between the races;

c. a detailed statement of the religious doctrinal basis for the "racial barriers" listed in answering b, above, providing, where appropriate, citations to authority for the doctrine or conclusions made therefrom.

12. Which of the racial categories listed in answering interrogatory 11a have been accepted as students at the School?

13. Provide the "Statement of Policy of the Board of Trustees" referred to in paragraph 9 of the complaint, state the date it was promulgated or authorized by the Board of Trustees, and state the nature of any governmental action that prompted the Board of Trustees to issue the statement.

14. May students of different nationalities (but within the same racial grouping) be admitted to the School? If the answer is in the affirmative, state each nationality that has been represented by students at the School.

15. State the name and current address of the person presently responsible for student admissions.

16. State whether the plaintiff is affiliated with any church or organization of churches. If so, state the name and address of the church or organization of churches.

THOMAS P. MCNAMARA
United States Attorney

By: .....
Assistant United States Attorney

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

PLAINTIFF'S ANSWER TO INTERROGATORIES AND REQUEST FOR PRODUCTION

(Filed July 14, 1975)

Plaintiff, Goldsboro Christian Schools, Inc. (hereinafter sometimes referred to as the "School"), hereby answers the interrogatories of the defendant, United States of America, as follows:

1. Documents requested in item 1 of defendant's Interrogatories and Request for Production will be made available for inspection by counsel for defendant at the office of Brooks, Pierce, McLendon, Humphrey & Leonard in Greensboro, North Carolina, on July 21, 1975.

2. The names and current addresses of the ten persons most active or instrumental in the establishment of the School are as follows:

Dr. Ed Elrich, 1902 East Walnut Street, Goldsboro, N.C.
Mr. M. A. Brodeaux, 106 New Hope Road, Goldsboro, N.C.
Mr. Arnold Chestnut, Route 1, Princeton, N.C.
Mr. Marvin Rollins—deceased
Rev. Frank Davenport, 418 Dove Place, Goldsboro, N.C.
Mr. Ralph Barnes, 3016 E. Ash Street, Goldsboro, N.C.
Mr. Robert Fleming, Patetown Road, Goldsboro, N.C.
Mr. Roy S. Robinson, 102 Forrest Drive, Goldsboro, N.C.
Rev. Gary Hoffman, Route 1, Box 101, Salisbury, N.C. 28144
Mr. Carl George, Route 2, Haggerstown Road, Mittle Town, Maryland.

3. The School was not established in response to any specific actions, proposed actions or expected actions by any governmental body. It was established in response to what the organizers of the School perceived to be the deteriorating moral climate in government-operated schools and because the organizers felt that God would not have Christian parents expose their children to the evolutionary, humanistic, anti-Christian philosophy propounded in government schools.

Several of the organizers of the School had always felt that public schools were not appropriate places for the education of Christian children; others had recently come to that conclusion.

At the time the School was founded, its organizers were also concerned about such issues as profanity used by teachers in the public schools and the problems encountered by Christian students who could not participate in the social activities sponsored by the public schools, e.g., dancing. The organizers of the School were concerned by decisions of the Supreme Court of the United States that banned prayer and Bible-reading from public schoolrooms and mandated racial integration. It cannot be said, however, that the School was founded in anticipation of the integration of the local public schools, an event which occurred some years later.

4. The names and current addresses, to the extent available, of all persons serving on the Board of Trustees of the School and the dates that each person served on the Board are as follows:

Name	*Date of Service On Board*	*Address*	*Church Affiliation*
Frank Davenport	4/63-11/66	418 Dove Place, City	Faith F.W.B.
Ralph Barnes	4/63-11/66	3016 E. Ash, City	Faith F.W.B.
Robert Fleming	4/63-6/64	Patetown Rd., City	Faith F.W.B.
Bobby Floars	4/63-67	Salem Church Road, City	Faith F.W.B.
Jackie Floars	4/63-67	1906 E. Beech, City	Faith F.W.B.
Marcellus Harrison	4/63-64	Not Available	Faith F.W.B.
Carl Nanny	4/63-64	Not Available	Faith F.W.B.
Archie Rose	4/63-11/67	Not Available	Faith F.W.B.
Donald Walker	4/63-11/67	Not Available	Faith F.W.B.
Ed Ulrich	4/63-present	1902 E. Walnut St., City	2nd Baptist
M. A. Bordeaux	4/63-present	106 New Hope Road, City	2nd Baptist
Arnold Chestnut	4/63-present	Route 1, Princeton	2nd Baptist
Wesley Farmer	4/63-69	Salem Church Road, City	2nd Baptist
Herman Pate	4/63-64	Not Available	2nd Baptist
Linwood Player	4/63-67	107 Brentwood Dr., City	2nd Baptist
Marvin Rollins	4/63-71 (deceased)	415 Murray, City	2nd Baptist
Jack Smith	4/63-64	Not Available	2nd Baptist
Nathan Willis	4/63-64	Not Available	Not Available
Gary Hoffman	4/63-69	Not Available	Grace Baptist

Name	*Date of Service On Board*	*Address*	*Church Affiliation*
Ray Best	4/63-64	Not Available	2nd Baptist
Velton Bunch	4/63-64	Not Available	2nd Baptist
Carl George	4/63-64	Not Available	2nd Baptist
William Hare	4/63-present	103 Forest Dr., City	2nd Baptist
James Pascoe	4/63-64	Not Available	2nd Baptist
Roy Robinson	4/63-present	102 Forest Dr., City	Grace Baptist
Bryant Rogers	4/63-64	Not Available	2nd Baptist
William Tolar	4/63-64	Not Available	2nd Baptist
Robert Woodard	12/63-64	Not Available	2nd Baptist
Stan Rivenbark	10/64-69	614 Edgerton, City	2nd Baptist
Malcolm Yates	3/65-72	104 New Hope Rd., City	New Hope Methodist
Evertt Lambert	4/64-65	Not Available	Not Available
Blainey Hill	6/65-67	Route 1	2nd Baptist
Jay Smith	6/65-66	Not Available	P. F. W. B.
Kenneth Coor	6/66-present	1708 Laurel, City	Madison Ave. Baptist
LaRue Davis	6/66-67	Hwy. 581, City	Faith F.W.B.
Joe DuBois	6/66-67	Airboro	Oak Heights P.F.W.B.
Owen Gainey	6/66-11/66	LaGrange	Trinity F.W.B.
Harold Gurley	6/66-70	P. O. Box 472, City	Faith F.W.B.
William Gurley	6/66-70	1104 Acaica, City	Faith F.W.B.

Conrad Hall	6/66-67	Not Available	Tabernacle P.H.
Rand Holland	6/66-67	Route 2, Fremont	Union Grove F.W.
Joe Longnecker	6/66-8/66	Not Available	2nd Baptist
Carroll Lynch	6/66-present	Rt. 5, Box 434B, City	2nd Baptist
Bill Polter	6/66-67	1801 E. Beech, City	2nd Baptist
Earl Price	6/66-67	Princeton	Princeton Miss. Baptist
Solly Sauls	6/66-67	Route 4	P.F.W.B.
Tom Suggs	6/66-68	Not Available	2nd Baptist
Roger Turnage	6/66-71	Grantham Road	P.F.W.B.
John Vincent	6/66-present	802 S. Madison	2nd Baptist
Ralph Walker	6/66-67	1420 W. Grantham	P.F.W.B.
Allen Scroggs	6/66-present	600 Guilford St., City	2nd Baptist
Bill Bradley	10/66-69	1715 E. Royal Ave.	Grace Baptist
Ronnie Peele	10/66-11/67	Not Available	Victory F.W.
J. C. Davis	10/66-67	Not Available	Tabernacle P.H.
C. D. Bennett	11/66-present	1207 Crisp St., City	2nd Baptist
Walter Pierce	11/66-68	Not Available	Not Available
Russell Spence	3/67-69	Not Available	Not Available
James Hurst	3/67-68	Not Available	2nd Baptist
Sam Wells	6/67-4/75	307 Hollybrook Rd., City	2nd Baptist
Robert Malpass	6/67-present	Rt. 7, Box 207B, City	1st Baptist
Norwood Mills	6/67-11/67	Not Available	Not Available
H. A. West	6/67-71	Route 9, Box 91, City	Tabernacle P.H.

Name	*Date of Service On Board*	*Address*	*Church Affiliation*
Gordon Forehand	6/67-72	Box 1241, City	1st Christian
Rudolph Chestnut	6/67-present	805 Emily Street	2nd Baptist
B. E. Dean	6/68-70	Not Available	Not Available
W. J. Corrieri	6/68-present (deceased)	1801 E. Beech St., City	2nd Baptist
Sam McNeill	6/68-72	2506 Lisa Lane	2nd Baptist
E. J. Melvin	6/68-72	Rt. 1, Box 371, Dudley	2nd Baptist
J. B. Faulk	6/68-present	Rt. 2, Box 545, Mt. Olive	Bear Marsh Baptist
Billy R. Hinson	6/68-present	Rt. 3, Box 293, City	Trinity Baptist
Don Hill	6/68-70	Rt. 5	1st Baptist
G. C. Gorman	6/68-present	704 Chaffin Rd., City	G.K. Presbyterian
Dave Baker	6/68-69	Not Available	Not Available
Arcie Hines	6/68-present	Rt. 7, Box 441, City	Salem Methodist
William Pruett	6/69-74	506 Chaswell Place, City	Madison Ave. Baptist
Andy Andrews	6/69-72	500 N. Audubon Ave., City	St. Luke Methodist
Denver Mitchell	6/69-74	303 Patetown Rd., City	Stony Creek F.W.B.
James Heath	6/69-present	Rt. 2, Box 317, Snow Hill	2nd Baptist
Arnold Tingen	6/69-present	Rt. 3, Snow Hill	Not Available
Milton West	6/69-72	411 Quail Dr.	2nd Baptist
Jack Porter	6/70-71	603 Banks Ave., City	Madison Ave. Baptist

John W. Smith	6/70-72	Rt. 2, Box 295, LaGrange	Free Gospel Tabernacle
Corbett L. Quinn	6/70-71	Box 128, Magnolia	Not Available
Bob Thomas	6/71-4/72	1213 N. Jefferson St.	2nd Baptist
Willie Hardy	6/71-present		2nd Baptist
Gordon Combs	6/71-72	2005 Rose St., City	1st Baptist
Zeb Musgrave	6/71-present	602 S. Madison Ave.	Madison Ave. Baptist
M. B. Gentry	6/71-present	Rt. 2, Box 487H, City	2nd Baptist
Gerald Aycock	6/71-present	Rt. 2, Box 190, Fremont	Grace Baptist
R. A. Sasser	6/72-74	Rt. 2, Fremont	Not Available
Delmar Johnson	6/72-present		
Donald Price	6/72-present	Rt. 1, Box 228, Dudley	Grace Baptist
Bobby Collier	6/72-present	Box 266, Pikeville	Temple Baptist
Aubrey Jackson	6/72-present	Rt. 5, Box 72	Central Baptist
Ruben Reason	11/74-present	Rt. 5, Box 385, Wilson	Not Available
John Campbell	11/74-present	Box 730, Wilson	Not Available
Robert Fleming	11/74-present	Rt. 2, Fremont	Union Grove F.W.B.

5. The documents requested in Item 5 of defendant's Interrogatories and Request for Production will be made available for inspection by counsel for defendant at the office of Brooks, Pierce, McLendon, Humphrey & Leonard on July 21, 1975.

6. Other than the Board of Trustees, there are two governing bodies at the School—the Executive Committee of the Board of Trustees and the School Administration. Both bodies are subordinate to the Board. The nature of both bodies is that implied by their names. Minutes of meetings of the Executive Committee will be made available for inspection by counsel for the defendant at the office of Brooks, Pierce, McLendon, Humphrey & Leonard on July 21, 1975. The School Administration does not keep written records of its actions.

The names and addresses of those presently serving on each body is as follows:

Executive Committee:

Chairman and President:
Dr. Ed Ulrich, 1902 E. Walnut St., Goldsboro, N.C.

Vice Chairman:
Arcie L. Hines, Route 7, Box 241, Goldsboro, N.C.

Secretary:
J. H. Vincent, 802 South Madison Avenue, Goldsboro, N.C.

Members at Large:

W. P. Hardy, Route 10, Box 192, Lot 9, Goldsboro, N.C.

M. B. Gentry, Route 2, Box 478 H, Goldsboro, N.C.

Kenneth Coor, 1708 Laurel Street, Goldsboro, N.C.

Administration:

President:
Dr. Ed Ulrich, 1902 E. Walnut Street, Goldsboro, N.C.

Principal:
Rod Helder, 408 Quail Drive, Goldsboro, N.C.

Business Manager:
David Forrest, 1707 E. Beech Street, Goldsboro, N.C.

Maintenance Supervisor:
Roger Phenicie, 1708 Palm Street, Goldsboro, N.C.

Transportation Supervisor:
Horace Lennon, 1014 E. Walnut Street, Goldsboro, N.C.

7. The documents requested in Item 7 of defendant's Interrogatories and Request for Production will be made available for inspection by counsel for defendant at the office of Brooks, Pierce, McLendon, Humphrey & Leonard on July 21, 1975.

8. The documents requested in Item 8 of defendant's Interrogatories and Request for Production will be made available for inspection by counsel for defendant at the office of Brooks, Pierce, McLendon, Humphrey & Leonard on July 21, 1975.

9. The documents requested in Item 9 of defendant's Interrogatories and Request for Production will be made available for inspection by counsel for defendant at the office of Brooks, Pierce, McLendon, Humphrey & Leonard on July 21, 1975.

10. Before any student is admitted to be enrolled at the School, that student and at least one of his parents must be interviewed by either the principal or the president of the School. Admission may be denied on the basis of the interview.

There are both written and unwritten understandings between the School and parents and/or students regarding the Christian nature of the School and the obligations placed on all parties thereby. It would not be possible to restate all the obligations implied in loyalty to the Bible, but all parties involved in the School understand their responsibility to conduct themselves in a manner that is consistent with the beliefs of fundamentalist Christianity. This is an obligation that runs from the School to parent and student as well in the opposite direction.

11. a. According to the Bible all men are descended from Noah. Race is determined by descendance from one of Noah's three sons—Ham, Shem and Japheth. God has endowed the descendants of each son with unique characteristics and functions. The three major races are further subdivided into descendants of the sons of each of Noah's sons. These divisions are provided in the ninth chapter of the Book of Genesis in the Bible, and in the chapters that follow. Races are subdivided into nationalities. Under the three main races, the following present-day groups might be classified by way of example:

(1) Hamitic peoples:
Orientals, Egyptians, Indians, *Negros*

(2) Shemitic (Semitic) peoples:
Hebrews

(3) Japhethetic peoples (Japethites):
Caucasian, German, Scandinavian, Greek, Roman, Russian

11. b. The races are separate because God made them so. It is not necessary to know why He did so, or what His purpose was. God's revelation of His actions at the Tower of Babel (Genesis 11:1-9) reveals that the intermixing of races, culturally and otherwise *destroys the fear of God in the hearts of men* and will bring about the judgment of the entire human race. God's will is that each race should

be concerned with its own cultural and characteristics and should seek to preserve the best of its heritage under God.

The special characteristics of the three major races are demonstrated in the Book of Genesis (Chapter 9 ff.) Noah's two sons, Shem and Japheth, were specially blessed. And a special relation was to exist between God and Shem. The Semetic people were thus intended to be the prime spiritual and religious contributors to humanity. This is demonstrated by the call of Abraham and the building of the Hebrew people. The Japethites were intended to be leaders with special ability in political organization and leadership and military powers. Ham and his descendants were not specially blessed. This indicates that their prosperity as a race would come as the result of their drawing upon the spiritual leadership of the Semites and the political leadership of the Japethites.

God has ordained that there shall be separate races having separate functions, and He has commanded that they shall not mix—culturally or biologically. Dealings may not be had between the races that would violate His command and lead to a dilution of the culture or characteristics that are special to each race.

An important "level or category of commerce" in this regard is any occasion of sustained contact or intimacy between children or adolescents of different races. The problem of intermarriage is, of course, acute where the emotionally immature are brought together on a day-to-day basis, whether the occasion is schooling, community, atheletic or social functions, or other similar situations.

Apart from the problem of intermarriage and the necessity to protect against it, God's will is that the separate cultures of the races shall be preserved and shall not be mixed. His intention is that a people of one culture and religious heritage shall not absorb the ways of another. This has obvious implications regarding dealings between races for the field of education and for the cultural activi-

ties of persons of all ages in general (apart, of course, from certain religious activities, such as worship). In such areas the races should be kept separate.

As far as most other matters are concerned, dealing between the races that do not hinder the goal of separately preserved races and cultures, are not contrary to the will of God. An example would be commerce (in its narrow sense). Indeed, few dealings between responsible adults of different races would be objectionable apart from those that tend to erode cultural identity.

11. c. The sincere religious belief of the School is that integration of races in the sense indicated in the responses to paragraphs 11 a. and 11 b. is contrary to the will of God. To cross the racial barriers established by God in the manner discussed in the responses to paragraph 11 b. is thus to contravene and to disobey the will of God as revealed to the School.

God's will is made known to man by means of revelation. The primary source of revelation is God's Word as set forth in the Holy Bible. (A representative but not exhaustive list of scriptures that reveal God's will on matters of race includes the following: Genesis 9:24-12:4; Numbers 24:1-18; Deuteronomy 7:1-11 and 17:14-20; Ezra 9 and 10; Nehemiah 13:1-31; Isaiah 2:1-5; Acts 17:24-38 and 15: 1-35.) There are other sources of revelation. They are not contradictory to Biblical revelation, rather they supplement it providing the means whereby Christians can know God's will in situation not explicitly covered in scripture. One such source is the observable nature of the universe. Since God created it, His will may be revealed in the nature of His creation. Another such source is direct revelation from God to man which may occur through prayer and meditation, preaching, Bible reading, or a combination of those things. The School knows God's will on matters of race through each of these sources of revelation.

It is most convenient to provide "a detailed statement of the religious doctrinal basis" for a religious belief through Biblical exegesis since in the case of exegesis the source of revelation is available in objective form for all to examine. Such an exegesis is included in this response to Interrogatory 11 c. But the School's beliefs rest also on the supplementary sources of revelation mentioned above. Indeed, in the last analysis religious belief resides in the souls of believers and no revelation—regardless of its source—is complete until it has been received through God's guidance by those who seek it. Therefore, a discussion of passages in the Bible that reveal God's will on matters of race is necessarily incomplete unless one realizes that the doctrine that follows therefrom is truly religious only to the extent that God has revealed correct interpretations to the reader.

As a matter of doctrine then, the Goldsboro Christian School believes that God created separate races, each having separate characteristics and each intended to play a separate role in His creation. The School further believes that any action by man that tends to erode the biological and cultural distinctions created between races is contrary to God's will. That God, having created separate races, wills them to remain separate is demonstrated repeatedly in the Bible. In the book of Genesis alone, for example, twice racial intermarriage or the threat of it caused God to intervene directly in human affairs; and another time it caused untold human misery. The three instances alluded to are, first, the great flood sent by God that destroyed all humanity save Noah and his family. That flood was a response to the arrogance and wickedness that developed in the world when the line of Seth intermarried with the line of Cain. (Genesis 6:1-6) Later, God intervened again in human affairs when the children of Noah's sons, who were and are separate races, undertook together to build the Tower of Babel. (Genesis 11:7-9) Again, it appeared that the product of race-mixing, whether biologically or

culturally, was arrogance and wickedness in the hearts of men. The third instance referred to above is told in Genesis 16. There Abraham, a Semite, took a Hamitic handmaiden and caused her to conceive. She bore a son, Ismael, who was, as a result of the interracial union, a wild man and whose descendants to this day are embroiled in warfare and unrest as is discussed elsewhere in this response to Interrogatory 11 c.

Other passages might serve as well to demonstrate the same things. The clear revelation to the School is that God's will is that there shall be separate races and that they shall keep separate. This separation extends both to cultural and biological lines because each race has a separate function and separately valuable characteristics. Mixing dilutes distinctiveness and impairs performance of separate functions, and moreover encourages wickedness and arrogance in the hearts of men.

A complementary revelation of God's will on the matter of race is in His creation. No people who believe in a divinely created universe can believe that separate races were created by accident. The separation of the races is a part of the order of creation.

Nowhere in the Bible does it say "Thou shalt not educate little children of different races in the same school." But to do so would clearly contravene God's will as it is revealed in the Bible because it would heighten the threat of intermarriage, dilute cultural distinctiveness and foster arrogance. Of course, one need not expect that the Bible will deal explicitly with every human problem. Other sources of revelation demonstrate God's will in myriad human affairs. By means of prayer, meditation and Bible reading, the School knows God's will in the matter of interracial education.

While there may be more than one rational interpretation of a passage from the Bible, God's will is one. And the revelation of His will in applying scriptures to human affairs does not lie in determining the most reasonable

interpretation of a given passage. Rather, God's will in a particular instance is revealed through Bible reading, prayer and meditation; and the answer is identified as received conviction, not rational deduction.

Attached hereto is a message on the general topic suggested by paragraph 11 c. of defendant's Interrogatories. It was delivered by Dr. Ed Ulrich from the pulpit of the Second Baptist Church in Goldsboro, North Carolina. The message was prepared and delivered during the time that Dr. Ulrich was involved in preparing the responses to defendant's Interrogatories. It is attached hereto and made a part of this response to paragraph 11 c.

12. The School has accepted only Japethites. On a few occasions children have been accepted who have one Japethite parent and one Hamitic or Semitic parent. The School believes that if one of a person's parents is a Japethite he may be educated as such.

13. The "Statement of Policy of the Board of Trustees" was adopted on June 26, 1971, as the written statement of the Board's pre-existing policy. The purpose of committing the Board's policy to writing was to respond to indications at that time that the Internal Revenue Service was investigating the Goldsboro Christian School with the intent of denying the School tax benefits because it could not accept students of more than one race. The Board hoped that it might avoid problems with the Internal Revenue Service by demonstrating that the School's admissions policy was dictated by the will of God and, therefore, subject to constitutional protection.

14. Yes. All students at the School have been American citizens and Japethites (Caucasians in each case).

15. Doctor Ed Ulrich
1902 East Walnut Street
Goldsboro, North Carolina

Mr. Rod Helder
1902 East Walnut Street
Goldsboro, North Carolina

16. Yes. Second Baptist Church, Goldsboro, North Carolina.

This the 14th day of July, 1975.

GOLDSBORO CHRISTIAN SCHOOLS, INC.

By /s/ DR. E. E. ULRICH
Dr. E. E. Ulrich

NORTH CAROLINA
GUILFORD COUNTY

Verification

DR. E. E. ULRICH, being duly sworn, deposes and says that he is Chairman of the Board of Trustees and President of Goldsboro Christian Schools, Inc., that he has read and prepared the foregoing Answer to defendant's Interrogatories and Request for Production, and that such answers are true and correct to the best of his knowledge and belief.

/s/ DR. E. E. ULRICH
Dr. E. E. Ulrich

(Jurat omitted in printing)

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

ANSWER

(July 21, 1975)

The defendant, United States of America, for its answer to plaintiff's complaint herein, admit, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1, except denies that any taxes, interest or penalties were illegally, erroneously or wrongfully assessed against or collected from plaintiff and denies that plaintiff is entitled to any recovery.

2. Is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the allegations contained in paragraph 4.

5. Avers that the sections of the Internal Revenue Code cited by the plaintiff speak for themselves and paragraph 5 therefore requires no answer.

6-11. Is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 through 11.

12. Denies the allegations contained in paragraph 12.

13. Denies the allegations contained in paragraph 13, except avers that news releases and Revenue Rulings published by the defendant speak for themselves.

14. Avers that the first two sentences of paragraph 14 are conclusions of law and do not require any response,

and as to the remaining allegations in paragraph 14, is presently without knowledge or information sufficient to form a belief as to the truth of those allegations.

15. Is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15, except specifically denies any allegations contained in the alleged claim for refund not otherwise admitted herein and avers that the Court lacks jurisdiction over any claim for abatement of taxes.

16. Is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16.

17. Denies the allegations contained in paragraph 17, except avers that Sections 501(c)(3) and 501(a) of the Internal Revenue Code and the Regulations thereunder speak for themselves.

18. Denies the allegations contained in paragraph 18.

19. Denies the allegations contained in paragraph 19.

Second Claim for Relief

1-2. Responds to paragraphs 1 and 2 as it responded to the allegations contained in paragraphs 1, 2 and 3 of the First Claim for Relief.

3. Denies the allegations contained in paragraph 3.

4. Responds to paragraph 4 as it responded to the allegations contained in paragraphs 6 through 10 of the First Claim for Relief.

5. Is presently without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5.

6. Denies the allegations contained in paragraph 6.

7. Denies the allegations contained in paragraph 7.

8. Avers that the first two sentences of paragraph 8 are conclusions of law and do not require any response, and as to the remaining allegations in paragraph 8, is presently without knowledge or information sufficient to form a belief as to the truth of those allegations.

9. Is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9, except specifically denies any allegations contained in the alleged claim for refund not otherwise admitted herein and avers that the Court lacks jurisdiction over any claim for abatement of taxes.

10. Is presently without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10.

11. Denies the allegations contained in paragraph 11.

12. Denies the allegations contained in paragraph 12.

WHEREFORE, the defendant prays for judgment in its favor, for its costs, and for such other and further relief as this Court deems just and proper.

THOMAS P. MCNAMARA
United States Attorney

By: .....
Assistant United States Attorney

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

DEFENDANT'S SECOND INTERROGATORIES AND REQUESTS FOR PRODUCTION

(Filed October 30, 1975)

Pursuant to Rules 33 and 34, Federal Rules of Civil Procedure, the defendant requests that the plaintiff answer the following interrogatories and produce the requested documents. The plaintiff may satisfy the requests for production by serving copies of the requested documents upon counsel for the defendant at the same time as filing the answers to the interrogatories. In lieu thereof, the defendant requests that the plaintiff produce the documents at the office of the United States Attorney, 310 New Bern Avenue, Raleigh, North Carolina, on November 28, 1975, or at such other convenient time and place as may be mutually agreed upon between counsel for the plaintiff and counsel for the defendant.

All interrogatories and requests for production refer to the entire period of the plaintiff's existence since its incorporation in 1963, unless otherwise specifically stated. All references to the years in issue are to the years 1969 through 1972. All references to the "school" are to the Goldsboro Christian Schools, Inc. (or its legal predecessor or successor corporations).

17. Did the plaintiff's Board of Trustees ever adopt a policy or other requirement that Negroes or any other racial grouping be excluded from admission to the plaintiff? If the answer is in the affirmative, please answer the following interrogatories and produce the requested documents:

(a) State the date or dates the requirement was adopted;

(b) State the names and current addresses of the Trustees participating in the decision, and indicate how each voted;

(c) If any Trustee declined to vote on the requirement, state his name and current address; and

(d) Produce all minutes, correspondence or other written or printed material reflecting the decision.

18. Did the Executive Committee of the plaintiff's Board of Trustees ever adopt a policy or other requirement that Negroes or any other racial grouping be excluded from admission to the plaintiff? If the answer is in the affirmative, please answer the following interrogatories and produce the requested documents:

(a) State the date or dates the requirement was adopted;

(b) State the names and current address of the members of the Executive Committee participating in the decision, and how each voted;

(c) If any member declined to vote on the requirement, state his name and current address;

(d) Produce all minutes, correspondence and other written or printed documents reflecting the decision;

(e) State the date the decision was reported to the Board of Trustees; and

(f) Produce all minutes, correspondence or other written or printed materials reflecting that the decision was reported to the Board of Trustees and the action the Board took, if any.

19. Did the School Administration ever adopt a policy or other requirement that Negroes or any other racial

grouping be excluded from admission to the plaintiff? If this answer is in the affirmative, please answer the following interrogatories and produce the requested documents:

(a) State the date or dates the requirement was adopted;

(b) State the names and current addresses of the members of the School Administration participating in the decision, and how each voted;

(c) Produce all minutes, correspondence, or other written or printed material reflecting the decision;

(d) State the date or dates the decision was reported to the Board of Trustees or its Executive Committee; and

(e) Produce all minutes, correspondence, or other written or printed material reflecting the reporting of the decision to the Board of Trustees or the Executive Committee and their action, if any.

20. Does the plaintiff require that the students admitted to the school subscribe to its alleged religious belief that the races should not mix culturally or biologically? If the answer to this interrogatory is in the affirmative, please answer the following interrogatories and produce the requested documents:

(a) State the manner in which the students are advised that this is a requirement of their admission;

(b) If the advice is in writing, produce the written documents conveying the advice;

(c) Are the students required to affirmatively indicate their subscription to this belief?

(d) If the answer to subparagraph (c) is in the affirmative, state the manner in which the students affirmatively indicate their subscription to the belief; and

(e) If the students must indicate in writing that they subscribe to the belief, produce copies of the documents wherein they indicate the subscription.

21. Does the plaintiff require the students admitted to the school to subscribe to any specific religious beliefs (such as not dancing, not drinking, not smoking or the like)? If so, please answer the following questions and produce the requested documents:

(a) State the nature of each such religious belief;

(b) State the manner in which the students are advised of the requirement;

(c) If the students are advised in writing, produce the written documents conveying the advice;

(d) Are the students required to affirmatively indicate their subscription to the belief?

(e) If the answer to subparagraph (d) is in the affirmative, state the manner in which the students affirmatively indicate their subscription to the belief; and

(f) If the students must indicate in writing their subscription to the belief, produce the documents wherein they indicate the subscription.

22. Does the plaintiff require the teachers or other employees to subscribe to its alleged religious belief that the races should not mix culturally or biologically? If the answer to this interrogatory is in the affirmative, please answer the following interrogatories and produce the requested documents:

(a) State the manner in which the teachers or other employees are advised that this is a requirement to their employment;

(b) If the advice is in writing, produce the written documents conveying the advice;

(c) Are the teachers or other employees required to affirmatively indicate their subscription to the belief?

(d) If the answer to subparagraph (c) is in the affirmative, state the manner in which the employees affirmatively indicate their subscription to the belief; and

(e) If the teachers or other employees must indicate in writing that they subscribe to the belief, provide copies of the documents wherein they indicate that they do so subscribe.

23. Does the plaintiff require the employees of the school to subscribe to any specific religious beliefs (such as not dancing, not drinking, not smoking or the like)? If so, please answer the following questions and produce the requested documents:

(a) State the nature of each such religious belief;

(b) State the manner in which the employees are advised of the requirement;

(c) If the employees are advised in writing, produce the documents conveying the advice;

(d) Are the employees required to affirmatively indicate their subscription to the belief?

(e) If the answer to subparagraph (d) is in the affirmative, state the manner in which the employees affirmatively indicate their subscription; and

(f) If the employees must indicate in writing their subscription to the beliefs, provide the documents wherein they indicate the subscription.

24. Produce all books, pamphlets, tracts and other written materials used by the plaintiff and its students for either educational or religious purposes which espouse the separation of the races for educational purposes as a fundamental religious belief.

25. Are the students of the plaintiff instructed that the separation of the races for educational purposes is a fundamental religious belief? If the answer is in the affirmative, state the course or courses in which the instruction is given and the general content of the instruction.

26. Identify the various religious denominations represented in the student body of the classes maintained by the plaintiff, identifying, if possible, the particular convention, synod or other subdivision of the denominations involved and the percentage of students attending from that denomination or subdivision.

27. Do the various denominations or subdivisions thereof identified in answering interrogatory No. 26 subscribe to the plaintiff's alleged belief that the races should not mix culturally or biologically? If any do not, please identify them.

28. Does the Second Baptist Church of Goldsboro permit Negroes or persons of any non-caucasian racial group to attend any of its religious exercises? If the answer is in the affirmative, state the particular religious exercise that they are permitted to attend and state in detail the conditions under which they are permitted to attend.

29. Do the children of any teacher or other employee of the plaintiff attend educational institutions (including public schools or colleges) which do not have a policy of excluding Negroes or any other racial grouping solely on the basis of race? If so, identify each teacher or employee and state the name of the educational institution involved.

30. State the organizational structure for the Second Baptist Church of Goldsboro, as it does or might pertain

to the persons or groups having the authority to determine which, if any, church activities may be participated in by more than one race. (For example, would such decisions be submitted tc and passed upon by the membership alone, or would the decisions be shared by the Deacons or other such groups.)

31. Has the Second Baptist Church of Goldsboro ever formally adopted a public position stating its belief that the races should not mix culturally or biologically? If so, state each instance in which that was done, and produce all minutes, correspondence, and other written or printed documents reflecting the public position.

32. Is the Second Baptist Church of Goldsboro affiliated with any national, regional or local convention of churches (such as the Southern Baptist Convention)? If so, identify each such convention, state whether each has adopted any position regarding the mixing of the races, whether culturally, biologically, for purposes of worship, or for purposes of religion, and briefly describe the position adopted.

33. State the basis of the plaintiff's allegation in paragraph 2 of the Complaint that it is operated as a "facility" of the Second Baptist Church of Goldsboro, providing, *inter alia,* the percentage of the plaintiff's total expenditures for the years involved which were funded by contributions from the Second Baptist Church of Goldsboro.

34. State the total contributions received by the plaintiff during the years in issue and the amount thereof supplied by the Second Baptist Church of Goldsboro. (For purposes of this interrogatory, contributions means all gross receipts other than receipts in return for goods or services provided by the plaintiff.)

35. During the years in issue, did the Second Baptist Church provide the plaintiff the free use of any facilities, the free use of any employees or any other type of in-kind assistance? If so, state the nature of such assistance, state

the approximate annual value of each type of assistance provided, and identify all documents and other written or printed materials authorizing the grant of each type of assistance.

36. With respect to the physical facilities used by the plaintiff during the years in question in furtherance of its purposes, answer the following interrogatories and produce the requested items:

(a) Describe each facility, including its approximate net value in the years in issue;

(b) State the name and current address of the legal and equitable owner of each facility; and

(c) If the owner of each facility is other than the plaintiff, state the terms of the plaintiff's use of the facility and produce the lease, minutes, correspondence or other written or printed materials reflecting the terms of the plaintiff's use.

37. Does the Second Baptist Church receive contributions which are designated by the contributors or are otherwise earmarked for the use or benefit, either directly or indirectly, of the plaintiff? If so, state the amounts of such contributions during the years in issue and state the nature of the use or benefit funded by such contributions.

38. Identify and describe the premises upon which the plaintiff's teaching activities were conducted.

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THOMAS P. MCNAMARA
United States Attorney

By: /s/ CARL L. TILGHMAN
Assistant United States Attorney

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

AMENDED ANSWER

(Filed October 30, 1975)

The defendant for its answer to plaintiff's complaint, admits, denies, and alleges as follows:

First Claim for Relief

1. Admits the allegations contained in paragraph 1, except denies that any taxes, interest or penalties were illegally, erroneously or wrongfully assessed against or collected from the plaintiff and denies that the plaintiff is entitled to any recovery.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Admits the allegations contained in paragraph 4, except denies that the amounts alleged were erroneously assessed and collected from the plaintiff and further alleges that the stated amounts assessed relate both to the issue involved in the First Claim for Relief and in the Second Claim for Relief.

5. Alleges that the cited sections of the Internal Revenue Code of 1954 (26 U.S.C.) speak for themselves and therefore require no answer.

6. Admits the allegations contained in paragraph 6, except denies any implication that the school's activities are exclusively religious in nature and alleges that the predominant activity of the school is the teaching of secular subjects.

7. Is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph 7, but alleges that the cited section of the North Carolina General Statutes speaks for itself.

8. Admits that the school conducts some activities that are designed to encourage religious growth in its students, but is without information or knowledge sufficient to form a belief as to the specific allegations of the form or nature of the activities, the allegations regarding the requirements placed upon the teachers, and the allegations regarding the reasons for the school's alleged refusal to accept federal, state or local grants.

9. Is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph 9.

10. Is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph 10, except admits that there is some affiliation between the plaintiff and the Second Baptist Church of Goldsboro and denies the allegation that the plaintiff is a "facility" of the Second Baptist Church of Goldsboro.

11. Admits the allegations contained in paragraph 11, except is without information or knowledge sufficient to form a belief as to the statements made in the quoted paragraph of the Articles of Incorporation.

12. Admits the allegations contained in paragraph 12, except alleges that the plaintiff was organized to and does primarily engage in the secular education of its students, denies that the plaintiff is an organization qualifying for tax exempt status under Sections 501(a) and (c)(3) of the Internal Revenue Code of 1954, and alleges that the plaintiff is liable for the cited taxes imposed by the Federal Insurance Contributions Tax Act and the Federal Unemployment Tax Act.

13. Admits that the Internal Revenue Service, a branch of the defendant, has published certain news releases and Revenue Rulings interpreting Section 501(c)(3) of the

Internal Revenue Code of 1954 as excluding private schools, including schools with a religious affiliation, which exclude citizens solely on the basis of race, admits that the Internal Revenue Service assessed the stated taxes against the plaintiff, and denies that the assessments were erroneous or illegal.

14. Admits the allegations contained in paragraph 14, except is without information or knowledge sufficient to form a belief as to the allegations that the payments were sufficient to cover the taxes due with respect to the designated employees.

15. Admits the allegations contained in paragraph 15, but specifically denies that the plaintiff is entitled to any refund of the taxes, interest or penalties paid and further denies that the plaintiff is entitled to any abatement of the assessed, but unpaid, taxes, interest and penalties.

16. Admits the allegations contained in paragraph 16.

17. Denies the allegations contained in paragraph 17.

18. Denies the allegations contained in paragraph 18.

19. Denies the allegations contained in paragraph 19.

Second Claim for Relief

1. Admits the allegations contained in paragraph 1, except denies that any taxes and interest were illegally, erroneously and wrongfully assessed against and collected from the plaintiff and denies that the plaintiff is entitled to any recovery.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3, except denies that any taxes and interest were erroneously and illegally assessed against and collected from the plaintiff.

4. Incorporates by reference the answers contained in paragraphs 6 through 10 in the First Claim for Relief, as set forth above.

5. Admits that the plaintiff owns residences which are used by some of the teachers it employs, without cost to those teachers, but is without information or knowledge sufficient to form a belief as to the remaining allegations in paragraph 5.

6. Admits that the Forms 941 filed by the plaintiff did not include in the wages to employees the value of lodging furnished to them, but denies the remaining allegations in paragraph 6.

7. Admits the allegations contained in paragraph 7, except denies that any of the taxes and interest were erroneously and illegally assessed.

8. Admits the allegations contained in paragraph 8, except is without information or knowledge sufficient to form a belief as to the allegations of amounts of tax due with respect to the named individuals and alleges that the total for the fourth quarter should be $59.56.

9. Admits the allegations contained in paragraph 9, except denies that the taxes and interest were illegally and erroneously assessed, and denies that the plaintiff is entitled to a refund of the taxes paid or abatement of the assessed, but unpaid, taxes.

10. Admits the allegations contained in paragraph 10.

11. Denies the allegations contained in paragraph 11.

12. Denies the allegations contained in paragraph 12.

Counterclaim

1. This Counterclaim is authorized and sanctioned by the duly authorized delegate of the Secretary of the Treasury of the United States of America, is directed by the Attorney General of the United States of America, and is brought pursuant to the provisions of Section 7401 of the Internal Revenue Code of 1954, and pursuant to the provisions of Title 28, United States Code.

2. On October 3, 1974, the Commissioner of Internal Revenue duly and timely assessed against the plaintiff the following amounts of Federal Insurance Contribution Act (FICA) taxes and interest, the plaintiff paid the indicated amounts, and the plaintiff presently owes the indicated balances:

Quarter Ending	FICA Assessed	Interest Assessed	Plaintiff's Payments	Balance Due Defendant
3/69	$ 3,039.33	$ 968.38	$ 193.95	$ 3,813.76
6/69	2,356.02	715.33	151.50	2,919.85
9/69	2,248.12	665.41	71.39	2,842.14
12/69	4,676.30	1,313.98	183.31	5,806.97
3/70	4,909.20	1,306.59	146.56	6,069.23
6/70	4,047.71	1,015.92	113.46	4,950.17
9/70	4,034.28	952.03	108.39	4,877.92
12/70	7,480.46	1,653.08	168.13	8,965.41
3/71	8,575.23	1,767.79	193.38	10,149.64
6/71	7,063.63	1,349.06	171.10	8,241.59
9/71	6,502.07	1,144.28	156.42	7,489.93
12/71	11,576.47	1,863.65	235.43	13,204.69
3/72	11,841.90	1,730.70	226.58	13,346.02
6/72	10,093.77	1,322.15	191.08	11,224.84
9/72	8,951.10	1,038.20	169.85	9,819.45
12/72	12,557.72	1,285.88	231.30	13,612.30
	$109,953.31	$20,092.43	$2,711.83	$127,333.91

3. On October 7, 1974, the Commissioner of Internal Revenue duly and timely assessed against the plaintiff the following amounts of Federal Unemployment Tax Act (FUTA) taxes, interest and penalties, the plaintiff paid the amounts indicated and the plaintiff presently owes the balance as indicated:

Year	FUTA Assessed	Delinquency Penalty Assessed	Interest Assessed	Plaintiff's Payments	Balance Due Defendant
1969	$ 3,000.34	$ 750.09	$ 843.05	$196.60	$ 4,396.88
1970	4,988.66	1,247.17	1,102.43	177.60	7,160.66
1971	7,069.89	1,767.47	1,138.16	190.98	9,784.54
1972	8,572.17	2,143.04	865.67	182.92	11,397.96
	$23,631.06	$5,907.77	$3,949.31	$748.10	$32,740.04

4. The plaintiff is presently indebted to the defendant in the amounts alleged in paragraphs 2 and 3, totalling $160,073.96, plus interest as provided by law.

5. Despite notice and demand for these taxes, the plaintiff has failed to pay over the amounts.

WHEREFORE, the defendant prays that the plaintiff's complaint be dismissed with prejudice, that the Court enter judgment in favor of the defendant against the plaintiff in the amount of $160,073.96, and that the Court grant the defendant such other and further relief as may be just and proper.

THOMAS P. MCNAMARA
United States Attorney

By: /s/ CARL L. TILGHMAN
Assistant United States Attorney

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

REPLY TO COUNTERCLAIM

(November 12, 1975)

The plaintiff, Goldsboro Christian Schools, Inc., responding to the counterclaim set forth in defendant's amended answer, admits, denies and alleges as follows:

First Defense

The counterclaim fails to state a claim against plaintiff upon which relief can be granted for the reasons set forth in the Complaint.

Second Defense

Responding to the numbered allegations of the counterclaim set forth in defendant's amended answer:

I.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1, and therefore denies same.

II.

The allegations of paragraph 2 are denied, except that it is admitted that the Commissioner of Internal Revenue assessed against plaintiff the amounts of Federal Insurance Contribution Act (FICA) taxes and interest set forth in paragraph 13 of the First Claim for Relief in the Complaint and the amounts of withholding taxes and interest set forth in paragraph 7 of the Second Claim for Relief in the Complaint. Plaintiff admits that it paid the amounts indicated.

Plaintiff specifically denies that it presently owes defendant the amounts indicated in paragraph 2 for the reasons set forth in the First Claim for Relief and the Second Claim for Relief in the Complaint.

III.

The allegations of paragraph 3 are denied except that it is admitted that the Commissioner of Internal Revenue assessed the amounts of Federal Unemployment Tax Act (FUTA) taxes, interest and penalties indicated in paragraph 3 and that plaintiff paid the amounts indicated in paragraph 3. Plaintiff specifically denies that it presently owes defendant the amounts indicated in paragraph 3 for the reasons set forth in the First Claim for Relief in the Complaint.

IV.

The allegations of paragraph 4 are denied.

V.

Plaintiff admits that the Commissioner of Internal Revenue has demanded payment of the FICA and FUTA taxes, interest and penalties set forth in paragraph 13 of the First Claim for Relief in the Complaint, and the withholding taxes and interest set forth in paragraph 7 of the Second Claim for Relief in the Complaint. Plaintiff has paid the amount of FICA and FUTA taxes and interest set forth in paragraph 14 of the First Claim for Relief in the Complaint and the amount of withholding taxes, interest and penalties set forth in paragraph 8 of the Second Claim for Relief in the Complaint. On or about December 11, 1974, plaintiff filed Claims in Abatement on Form 843 with the District Director of the Internal Revenue Service in Greensboro, North Carolina, requesting abatement of the FICA, withholding and FUTA taxes, interest and penalties which were assessed against plaintiff less the amount of such taxes, interest and penalties which have been paid.

Plaintiff set forth in each Claim in Abatement as reasons for the allowance thereof the same grounds which were alleged in the First Claim for Relief and Second Claim for Relief in the Complaint. As of the filing of this Reply to defendant's Counterclaim, the Claims in Abatement have not been acted on by the Internal Revenue Service. Plaintiff admits that it has not paid over the amounts of FICA, withholding and FUTA taxes, interest and penalties covered by the aforementioned Claims in Abatement. Except as herein admitted, the allegations of paragraph 5 are denied.

WHEREFORE, plaintiff demands that defendant's Counterclaim be dismissed and that it be awarded judgment as prayed in the Complaint.

/s/ CLAUDE C. PIERCE
Claude C. Pierce

/s/ WILLIAM G. MCNAIRY
William G. McNairy

/s/ EDWARD C. WINSLOW III
Edward C. Winslow III
Attorneys for Plaintiff

Of Counsel:

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD
Post Office Drawer U
Greensboro, North Carolina 27402
Telephone: (919) 273-2591

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

PLAINTIFF'S ANSWER TO INTERROGATORIES AND REQUEST FOR PRODUCTION

Plaintiff, Goldsboro Christian Schools, Inc. (hereinafter sometimes referred to as the "School"), hereby answers the interrogatories of the defendant, United States of America, as follows:

17. Yes.

(a) A written policy was officially adopted on July 11, 1971. That writing expressed a pre-existing, unwritten policy.

(b) The School's minutes show that nineteen members of the Board of Trustees were present and voting. The names of those present are not reported. No one otherwise remembers who was present at that meeting. All those members present voted to adopt the policy. The names and addresses of the persons then constituting the Board of Trustees were furnished to defendant in plaintiff's response to defendant's interrogatory No. 4. The minutes of July 11, 1971 indicate that the following persons may have been present: Dr. Edward E. Ulrich, Mr. Robert Malpass, Mr. J. Allan Scroggs, Mr. J. H. Vincent, Mr. Arnold Chestnut, Mr. W. C. Hare, Mr. Carroll Lynch, Mr. Gerald Aycock, Mr. Kenneth Coor, Mr. Arnold Tingent and Mr. Roy Robinson.

(c) No Trustee present at the July 11, 1971 meeting declined to vote on the matter.

(d) Copies of relevant documents will be produced.

18. The chairman of the Executive Committee presented a proposed statement to the Executive Committee. The minutes of the Executive Committee's meeting do not reflect that a vote was taken regarding the statement. The Executive Committee subsequently presented the statement to the Board of Trustees which adopted it.

(a) June 26, 1971.

(b) Dr. Ulrich, Mr. Coor, Mr. Scroggs, Mr. Vincent and Mr. Hare were present at the meeting on June 26, 1971. For addresses see answer to interrogatory No. 4. No vote was recorded.

(c) No abstention was recorded.

(d) Copies of relevant documents will be produced.

(e) July 11, 1971.

(f) Copies of relevant documents will be produced.

19. No.

20. The School does not require that its students profess any particular belief or subscribe to any particular belief.

21. No. However, the School does require that its students adhere to certain standards of conduct that are consistant with and follow from the religious beliefs of the School.

22. The issue has never arisen. Perhaps understandably no teacher who does not share the School's beliefs has sought permanent employment at the School after learning the nature of its religious beliefs. The question of religious beliefs is typically discussed at length during employment interviews. In Paragraph 8 of the complaint a part of the employment contract that must be signed by teachers at the School is quoted. The contract requires faculty members to subscribe to the School's religious beliefs as a general matter and to regularly attend churches whose beliefs would encompass the School's beliefs about race. A copy of

the employment contract will be produced upon defendant's request.

23. Yes. Teachers are required to execute an employment contract that contains a general affirmation of faith.

(a) A copy of the relevant employment contract is attached hereto. The contract sets forth the beliefs to which teachers must subscribe.

(b) Employees are advised of the requirement during employment interviews and at the signing of the contract.

(c) The relevant documents will be produced.

(d) Yes.

(e) They are required to sign the employment contract.

(f) The relevant documents will be produced.

24. The relevant documents will be produced.

25. Yes. Instruction to the effect that separation of the races for educational purposes is a fundamental religious belief is given in the School's chapel services and other special services, and Bible classes required of each student each year, and in a Christian ethics course that is required of all seniors at the School. Instruction at chapel and other special services involves short talks in the nature of sermons on religious topics. Bible classes are self-explanatory; they stress learning about different portions of the Bible. The Christian ethics course is intended to teach students what actions and beliefs Bible-believing Christians should take in modern society.

26. Baptist	43.2%
Free Will Baptist	15.0%
Church of God	1.8%

Methodist	15.0%
Church of God of Prophesy	.6%
Assembly of God	.6%
Friends	2.7%
Pentacostal Holiness	20.0%
Christian	2.7%
Catholic	.6%
Pentacostal Free Will Baptist Holiness	6.0%
Church of Christ	.3%
Greek Orthodox	.9%
7th Day Adventist	3.%
Mormon	2.7%
Presbyterian	1.5%
Advent Christ	.9%
Lutheran	.3%
Buddhist	.3%
Nothing	2.7%

27. Plaintiff is without sufficient information to answer this interrogatory.

28. Yes. Worship services are open to members of all races without conditions. See plaintiff's answer to interrogatory No. 11. Those answers would apply to the Second Baptist Church of Goldsboro as well as the School.

29. Yes. Mrs. Bernice Hinnant, Bob Jones University. Mrs. Geraldine Robinson, Wayne Community College.

30. Typically the Board of Deacons would consider such questions. The Board of Deacons would make a proposal to the entire membership which would act on the questions.

31. No.

32. No.

This the 15th day of December, 1975.

(Filed December 15, 1975)

GOLDSBORO CHRISTIAN SCHOOLS, INC.

By /s/ ROD HELDER
Rod Helder

NORTH CAROLINA
GUILFORD COUNTY

Verification

ROD HELDER, being duly sworn, deposes and says that he is Principal of Goldsboro Christian Schools, Inc., that he has read and prepared the foregoing Answer to defendant's Interrogatories and Request for Production, and that such answers are true and correct to the best of his knowledge and belief.

/s/ ROD HELDER
Rod Helder

(Jurat omitted in printing)

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

(Title omitted in printing)

PLAINTIFF'S ANSWER TO INTERROGATORIES AND REQUEST FOR PRODUCTION

(January 19, 1976)

Plaintiff, Goldsboro Christian Schools, Inc. (hereinafter sometimes referred to as the "School"), hereby answers the interrogatories of the defendant, United States of America, as follows:

33. The Church was instrumental in organizing the School. The School is conducted on property owned by the Church. The president of the School has traditionally been the pastor of the Church. Members of the Church make up the Board of Directors of the School in large part. As a practical matter the beliefs and intentions of the Church and School are almost always the same.

.004 of the School's expenditures between 1969 and 1972 were funded by contributions from the Church.

34. Total gross receipts of the School between 1969 and 1972 were $1,945,810.41. Receipts by the School from the Church during that period were $8,632.81.

35. Yes.

Year	Nature of Assistance	Annual Value
1969	Custodian	$ 1,442.50
	Pastor	3,125.00
	Secretary	1,287.50
	Utilities	1,270.50
	Telephone	577.30
	Heating	457.69
	Water	193.58
	Building rental value	13,000.00
	Less: School reimbursement	(1,774.75)
	Total	$19,579.32
1970	Custodian	$ 1,727.50
	Pastor	3,205.00
	Secretary	1,335.00
	Water	165.45
	Utilities	810.45
	Telephone	1,025.67
	Heating	355.65
	Building rental value	20,000.00
	Less: School reimbursement	(4,356.56)
	Total	$24,268.16
1971	Custodian	$ 1,820.00
	Pastor	3,380.00
	Secretary	1,560.00
	Utilities	1,7[illegible]4
	Water	187.35
	Telephone	1,339.88
	Heating	882.30
	Building rental value	32,500.00
	Less: School reimbursement	(4,765.77)
	Total	$38,612.80

Year	Nature of Assistance	Annual Value
1972	Custodian	$ 2,055.00
	Pastor	3,480.00
	Secretary	1,795.00
	Utilities	2,073.34
	Water	332.03
	Telephone	1,455.35
	Heating	849.50
	Building rental value	32,500.00
	Less: School reimbursement	(3,026.49)
	Total	$41,513.73

There are no written documents that authorize the grants. Values for pastor, secretary and custodian are based upon estimates that half their time was applied to School matters.

36. 1969

1. (a) Stages (1 & 2) of the Church building located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land——$270,800

   (b) Second Baptist Church, Goldsboro, North Carolina

   (c) There are no leases or other instruments concerning the use of the above facilities by the School.

2. (a) Description and Value of residences:

Residence	Value
1304 Robin	$11,200
1305 North Drive	12,000
209 Banks	11,000
405 Banks	13,000

Residence	Value
2110 Rose	16,000
1416 Boyette	18,700
High School Building 1101 East Mulberry	13,250

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina.

1970

1. (a) Stages (1, 2 & 3) of the Church building located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land—$357,800

(b) Second Baptist Church, Goldsboro, North Carolina

(c) There are no leases or other instruments concerning the use of the above facility by the School.

2. (a) Description and value of residences:

Residence	Value
1304 Robin Street	$11,200
1305 North Drive	12,000
209 Banks Avenue	11,000
405 Banks Avenue	13,000
2110 Rose Street	16,500
1708 Beech Street	11,800
1702 Palm Street	13,200
1712 Palm Street	10,400
1708 Palm Street	17,380
1416 Boyette Drive	18,700

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina

3. (a) high school building, located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land—$332,500.

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina

1971

1. (a) Stages (1, 2 & 3) of the Church building located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land —$357,800

(b) Second Baptist Church, Goldsboro, North Carolina

(c) There are no leases or other instruments concerning the use of the above facilities by the School.

2. (a) Description and value of residences:

Residence	Value
1304 Robin Street	$12,000
1702 Palm	14,500
1708 Palm	17,500
1712 Palm	10,400
1707 East Beech	9,500
1708 East Beech	12,500
1908 East Beech	13,000
2110 Rose Street	17,000
1014 East Walnut	21,000

Residence	Value
312 N. Audubon Avenue	13,000
1605 East Maple	9,500
1305 North Drive	13,000
209 Banks	12,000
405 Banks	14,000
422 Cardinal	13,000
408 Quail Drive	15,500

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina.

3. (a) High School building located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land—$332,500

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina.

1972

1. (a) Stages (1, 2 & 3) of the Church building located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land —$357,800

(b) Second Baptist Church, Goldsboro, North Carolina.

(c) There are no leases or other instruments concerning the use of the above facilities by the School.

2. (a) Description and value of residences:

Residence	Value
208 Quail Drive	$14,500
209 Banks	13,000
210 Banks	13,000
211 Quail	16,000
212 Banks	14,500
218 Banks	14,000
312 Audubon	13,000
405 Banks	15,000
408 Quail	16,500
422 Cardinal	14,500
1014 East Walnut	21,000
1104 East Walnut	18,000
1213 North Jefferson	19,000
1304 Robin	12,000
1305 North Drive	13,000
1406 Catalpa	11,500
1508 Catalpa	11,000
1605 Maple	11,000
1605 Rose Street	22,000
1702 Palm	14,500
1706 Beech	14,000
1707 Beech	10,000
1708 Palm	17,500

Residence	Value
1708 Beech	13,000
1712 Palm	10,400
1900 Palm	14,500
1903 Palm	12,000
1908 East Beech	13,500
2110 Rose	17,500

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina

3. (a) High School building located at 1700 East Beech Street, Goldsboro, North Carolina. Value of building and land—$332,500

(b) Goldsboro Christian Schools, Inc., Goldsboro, North Carolina.

37. Yes.

Date	Amount of Contribution	Use of Contribution
1969	$2,411.30	General Fund
1970	2,481.48	General Fund
1971	2,768.53	General Fund
1972	971.50	General Fund

38. Stages (1, 2 & 3) of Church building located at 1700 Beech Street. Two assembly areas, 29 teaching classrooms, 1 library, School store, School offices, restrooms, parking area.

High School classroom building since September, 1970, located at 1700 East Beech Street, Goldsboro, North Carolina. 22 teaching classrooms, 2 Science labs, 1 Home Economics lab, 1 library, offices, restrooms, teachers' lounge, storage area.

This the 19th day of Janu..ry, 1976.

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GOLDSBORO CHRISTIAN SCHOOLS, INC.

By /s/ ROD HELDER
Rod Helder

NORTH CAROLINA
GUILFORD COUNTY

Verification

ROD HELDER, being duly sworn, deposes and says that he is Principal of Goldsboro Christian Schools, Inc., that he has read and prepared the foregoing Answer to defendant's Interrogatories and Request for Production, and that such answers are true and correct to the best of his knowledge and belief.

/s/ ROD HELDER
Rod Helder

(Jurat omitted in printing)

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

Civil No. 75-0020-Civ-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff;*

-v-

UNITED STATES OF AMERICA, *Defendant.*

DEPOSITION OF ROD HELDER

APPEARANCES

For the Plaintiff: Brooks, Pierce, McLendon, Humphrey & Leonard
Attorneys at Law
1400 Wachovia Building
P. O. Drawer U
Greensboro, North Carolina 27402;
Messrs. Claude C. Pierce and Edward C. Winslow, III, appearing.

For the Defendant: Mr. John A. Townsend, Attorney
United States Department of Justice
Refund Trial Section No. 2
Tax Division
Washington, D. C. 20530.

At Goldsboro, North Carolina.

January 19, 1976.

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REDIRECT EXAMINATION BY MR. TOWNSEND:

Q. Now, I—if I can draw your attention back to where we were discussing earlier that it becomes a matter of degree so that you can accept one non-Japheth or maybe

a few non-Japheths, but you couldn't accept many non-Japheths into a school that's geared to teach Japheths primarily,——

A. (Interposing) Yes, sir.

Q. ——is that correct?

A. Right.

Q. So then you would have no objections, I take it, to accepting one black into this school, is that correct?

A. I would have objection personally in the fact that you have a racial climate in the country and because of the problem in this area. In that sense I would, yes, sir.

If it hadn't been for that, there would be no problem.

Q. Well, would that violate any fundamental religious doctrine you hold, or was that just a practical problem that you would have with admitting him?

A. It would affect the, as I explained earlier, it is geared to the basic principle that I stated, as I see it.

Where—because in my estimation, and again you're having to rely on my own experience, and this is the way I see it.

There would be problems and it wouldn't work.

Q. Well, aren't there similar types of racial discrimination, and possibilities of ill will between Caucasians and Indians, for example?

A. There is not that climate in our country toward them, no, sir, as there is toward Negroes. So, in fact, the policy, in effect, bears only against the Negro and not against anyone but Negroes because of the climate that exists in this country?

A. There—isn't against anybody in particular. It is just saying that where we in—we get into a problem because of the climate in our country at the particular time and because of the geographical area.

It's not a—a matter of discrimination, and that's where we're having a hard time——

(Laughter.)

Q. (Interposing) No, but what I'm——
A. ——getting through.

Q. ——asking you that as a practical effect as applied, your policy, in effect, goes only toward prohibiting Negroes and any other racial grouping you will permit because there is not this feeling of—of, in this nation and in this region, this feeling of ill will or possible problems developing, is that correct?

A. You might look at it that way,

Q. Well, I'm asking you how you look at it?
A. I don't—I don't look at it that way because of—of the circumstances. Of course, I realize we're being judged from the outside——

(Laughter.)

——but from the inside, I feel sincerely this is the way it is.

Q. So you would have no problem accepting today, if one applied, a full-blooded Chinese?

A. One, I don't believe so. There's not that atmosphere in the country against the Chinese, and no contentions between the Chinese and the whites like there is the blacks and the whites.

Q. Would you have any problems accepting a full-blooded Indian—Egyptian?

A. I don't believe so. Same reasons.

Q. Full-blooded Indian?
A. I don't believe so. Same reasons.

Q. Is there anybody, other than a Negro, that you would have problems in accepting—any racial grouping?

A. We don't have problems accepting—accepting a Negro, except for the climate in the country today. It's not a matter of discrimination.

Q. And the Bible teaches you that when this climate exists in the country, you should not accept Negroes in school, or any racial grouping where this climate exists?

A. Where a climate exists whereby you have a certain race clamoring for certain things within the school's curriculum. Certain—making certain demands of society, every aspect of society, then I think you are on very thin grounds when you, particularly in a southern region where you open your doors to them in a Christian school situation.

Q. Okay, now, to get back to my question there, but if you just accepted one into the school, one person would not cause a problem?

A. I think it would personally.

Q. Just a single person?

A. Yes, sir.

Q. Okay——

A. (Interposing) And I would—excuse me—I'd like to emphasize that I realize the Board may look at it differently from what I would or even a teacher, but I think being principal of the school and having been here for nine years—I'm the oldest member, incidentally, of employees—office employee, that I think that I know better, probably than anybody else the mood of the folks in this area with whom I deal as far as the school, and I think I'm in a better position to make a valid assessment on that probably than most anyone else.

Q. Just to tie it all down, you are—you do fulfill the functions of a director of admissions, is that correct?

A. Yes, sir.

Q. You are charged with carrying out the policies of the Board in admitting students, is that correct?

A. Yes, sir.

Q. And you feel like you have carried out the policies?
A. Yes, sir.

Q. And what you have told me today are basically——
A. (Interposing) Yes, sir.

Q. ——the policies of the school?
A. Board members have told me that if they were in my shoes that when the Indian came in, that they would have done the same thing. They've told me that.

Q. What was the occasion—special circumstances that the Indian being admitted, can you tell me that?
A. They just came by and wanted to know if they could enroll her, and as far as I was concerned, there was no problem.

Q. Were the parents full-blooded Indians?
A. Yes, sir, both of them.

Q. What were they doing in Goldsboro, do you recall?
A. With the military here.

Q. Are they Christians?
A. No, sir.

Q. Do you recall why they wanted their child to attend this particular school?
A. They were—heard about our school, and they evidently heard of the conditions in the public schools in this area, and they wanted the child to get a good education. Evidently,—I think they were influenced probably by some other folks who had probably put in a good word for us, although I don't know that for sure, but that's my own supposition, and so they came here and made an application.

Q. But if a child or parents from Nigeria, for example, who was in the military under the same circumstances came by, you would not accept that child?
A. If it was a Negro, that's right.

Q. What religion is this Indian?

A. I don't know. I don't usually check into the religious background. As I mentioned earlier, in doing the interview, I deal only with whether or not the child is going to cooperate—whether the parent is going to work with us on this thing. I don't ask them, although our application blank does call for that, I don't usually ask them, and quite often they fill out the application blank after they meet me.

So, to me, it's not that essential——

Q. (Interposing) Don't they have to subscribe to some Christian creed in order to come to school?

A. No, sir.

Q. They do not?

A. No.

Q. Don't you have a creed for the school?

A. We do, yes, sir.

Q. Is it a Christian creed?

A. Yes, sir.

Q. And they don't have to subscribe to that?

A. No, sir, we—it's a statement of cooperation, and if they come to us with any religion under the sun as long as they cooperate, and they are not going to cause division and strife by being argumentative in the classroom. When it comes to Bible courses, we will take them in.

Q. And you require that child to go to all the Bible courses that every other child attends?

A. Yes, sir, well, that particular one is in kindergarten so it's not a big thing as it will be later on when we get into deeper things in the Bible.

Q. And you have admitted also children of mixed marriages, have you not?

A. Yes, sir.

Q. How many of those?

A. I don't really know offhand how many we have in. We have at least one or two, I would think,

Q. Are you talking about currently?

A. Yes, sir.

Q. And in the past you've also admitted them, have you not?

A. Yes, sir.

Q. Would that be—what—what other nationality or racial groupings did they come from?

A. (No answer.)

Q. One Caucasian—one of the parents was Caucasian and——

A. (Interposing) Yes, sir.

Q. ——the other was what?

A. Japanese, I think most of them.

Q. Any others that you can think of?

A. No.

Q. Japanese was the Hamite, were they not?

A. Yes, sir.

[Dep. p. 43, l.6—p. 52, l.11]

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

Civil No. 75-0020-Civ-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff;*

-v-

UNITED STATES OF AMERICA, *Defendant.*

DEPOSITION OF DR. E. E. ULRICH

APPEARANCES

For the Plaintiff: Brooks, Pierce, McLendon, Humphrey & Leonard
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1400 Wachovia Building
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Messrs. Claude C. Pierce and Edward C. Winslow, III, appearing.

For the Defendant: Mr. John A. Townsend, Attorney
United States Department of Justice
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Washington, D. C. 20530.

At Goldsboro, North Carolina.
January 19, 1976.

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DIRECT EXAMINATION BY MR. TOWNSEND:

Q. Okay, were you one of the founders of Goldsboro Christian——

A. (Interposing) Yes, sir.

Q. ——Schools? What position were you initially given with the school?

A. Chairman of the Board and acting principal, or Chairman of the Board and principal. I guess it wasn't called "acting".

Q. How long were you Chairman of the Board?
A. Until October, 1975.

Q. And how long were you principal?
A. Until Mr. Helder was named full principal and the school was reorganized as far as its administration was concerned.

Q. Are you familiar with the school's policy on racial discrimination?
A. Yes, sir.

Q. Would you state to me what they are?
A. The school's policy basically is, first of all, that, ideally, because we're dealing with immature children and young people that they should be educated separately in order to best instill in them the precepts of the word of God.

We recognized that with some students and some minorities there was no possibility of Christian education ever being available to them if separation were completely maintained, and so we felt as long as they understood the position of the school and would abide by the position of the school that when an application was made that we would attempt to take these as long as we found in the taking of them that there would be no difficulty with the school's position. Beyond that, of course, was the problem of blacks. Our school, as I believe you know, is on record because of the size of population that we would, which we believe would be the ideal for any race, that we would aid, and this has been offered actually to black people, in the establishment of a black Christian school because we believe in Christian education as basic.

We would feel that in taking blacks in this school because of the positions taken by groups in this country, such as the NAACP, CORE, or any of these—positions actually taken by the Federal government that an individual black child is not in the world by himself. That if that were all we were dealing with, that it is possible we could take that child on the same basis of somebody of another race, but with the other pressures that would be involved, militant organizations, what has seemed to be the attitude of the Federal government and so forth, that we find it probable that we could not deal with the black on the same basis, and to avoid the disruption, and the possible hurt to a black child that might be involved, we've said that we could not take them under these present circumstances.

Q. But then you do recognize that the Board's policies on racial discrimination, in effect, apply only to Negroes?

A. No, sir, no, sir.

Q. What other racial group do they apply to?

A. Any—any—any student of any group that would not abide by the practices, the purpose, and the beliefs of the school in their personal lives would not be kept here at all.

Q. But I'm not—I'm talking about being accepted.

A. They would not be, I presume it's still the same way. I've not been in touch with the school since—I mean, as far as working in administration since then, but I would presume it would be the same way. That they would not be accepted unless they were willing to abide by the beliefs and practices of the school.

Q. But individual, for example, you will agree with the policy of accepting this individual in here that we talked about this morning?

A. As long as, of course it wouldn't be a matter of the child as long as the parent would not want us to act contrary in our treatment of that child from what we would believe as far as race and practice are concerned.

Q. If a black came in and were willing to accept that condition, would the school accept the black?

A. If the—if the situation in the country, and I'm not talking about whether a person likes a black or not—that's not it.

If it were not for the militant organizations that could be involved, some of the things that come from the Federal government and so forth, it would probably be attempted.

Q. But, my question is directed to you in finding out that in effect your policy applies only to the blacks because you will accept Indians. We know that. We know the Christian school will accept Indians——

A. (Interposing) Well,——

Q. ——because they have accepted one to your knowledge——

A. (Interposing) ——I think the question is wrong because the policy is not an anti-black policy as such, and the way your question is worded would seem as if it were an anti-black policy.

Q. No, I didn't mean to give that impression,——

A. (Interposing) Well,——

Q. ——but what I'm trying to find out is that so far as you know in practical effect, that is the effect of the policy although it's worded differently here. The effect of it is that it goes toward one racial grouping, isn't that true?

A. The effect of it on the basis of the experiences we've had with—has more probably affected the black than any other, but if there were a moment of non-compliance by any other, it would be clear that it was affecting more than that.

I might state that in the years that I was here to my—to the best of my knowledge and belief, we never had a black to apply.

Q. But you do know that if you had had a black to apply, he would not have been accepted, don't you?

A. Right,——

Q. (Interposing) Okay,——

A. ——but it would have been explained——

Q. (Interposing) ——but you had Japanese to apply, didn't you?

A. No, full Japanese. We had, I think, four—four mixed Japanese.

Q. That would be mixed with Caucasian?

A. Caucasian—the father was Caucasian. The mother was Japanese.

Q. You did accept them, did you not?

A. Yes.

Q. And you would have accepted, if I understood the testimony correctly, you would have accepted a full-blooded Japanese, would you not?

A. Yes.

Q. Would you accept a full-blooded Chinese?

A. Yes, providing, of course, they accepted the policy and believed that as far as——

Q. (Interposing) You would not have rejected them solely because they were Chinese?

A. As long as they were willing to understand and practice in their personal lives the kind of policy that we had, they would not have been rejected.

Q. Okay, and the same thing is true of Indians, isn't it?

A. Right.

Q. Is there any grouping, other than Negroes, that you know of that you would have refused to accept solely because of their race?

A. Well, on the basis of the population of Goldsboro, no. If there had been, for instance, a large Oriental population

in Goldsboro, it's highly possible, and if there had been Oriental militants who could affect whatever was done, as far as the Orientals are concerned, it would have been exactly the same thing it is with blacks.

Q. So then, if I understand correctly it is because of the—because of the—let's see—it becomes a matter of degree, then. It's a matter of how many of these non-Caucasians in a particular grouping that are present and the degree of militancy?

A. If there would be any situation that because of size, activity, militancy, or anything that I might not think of now, but that would pose a serious problem to our taking a student and maintaining in the teaching and the operation of the school, the philosophy, the Bible teaching that we believe, then they would not be taken, who or what.

Q. Could you explain for me the religious basis for this policy you just described?

A. Yes, of course, you've had several references to Noah, to Shem, Ham, and Japheth, and of course, their descendants are listed in the same place. I mean you have a listing of the various descendants from which we would derive our list in—that was given to you.

Now, there's a great deal of belief that prior to that that you had the same thing that brought about the flood from the descendants of Cain and the descendants of Seth, who, of course, were two of the first sons of Adam, and that it was a racial intermingling of the cultures and the religious problems that were involved at that time between the Canaanites and the descendants of Seth that brought about the flood.

Now, if you go into God's dealing with the Hebrew people, you will find that, for instance, in the case of intermarriage—if a Hebrew intermarried with certain other races, descendants, for instance, would not be admitted into the House of the Lord for so many generations.

Q. Was this before or after Noah?
A. After Noah.

Q. Well, there were only two races after Noah, wasn't it—three races?
A. Uh——

Q. A Shem could only marry a Shemite, and two other races?
A. Well, you were—you had your basic distinctions for Japheth and Shem and Ham, but then, Ham had children of which there were several nationalities. You mentioned some of them that came from the descendants of Ham.

Japheth and Shem the same way.

Of course, the primarily—primarily those that are recognized as closest to purest of any today are Hebrew people.

Your Arabs are, of course, many people class them as Semitic, but they're about as much Ham as Semite.

But the children of Israel in their day they—there were other Semites, but they were commanded to marry with their own kind and in fact, if you go back to Abraham, he sent his servant on a long journey to find a bride for his son because he was afraid that Isaac might marry somebody out of his own race.

You'll find prohibitions that I was talking about a while ago where somebody who is—where a Hebrew intermarried with another race and couldn't be admitted to the House of the Lord, I think it was, and it was four generations.

You'll find in much, much later—for instance, Ezra's day after the captivity of the Children of Israel—their going back into the land. They—when Ezra, who was the scribe, the priest, the teacher of the Word of God—when he went back, he found even among the leadership a great deal of racial intermarriage of when the people come to dwell in the land, and he realized what the teaching of the Word of God had been, and what it could to do his people,

and they had a great meeting. It's one of the most—to me—one of the most difficult things in all the Bible, but they had this meeting and the men all promised that they would put away their foreign wives and their foreign children.

Now, I'm not saying that racial mixed marriages ought to do the same thing today, but this—this was what was taught, and this is what they did.

Now, in the New Testament, there seemed to be an idea in the early church,—Paul deals with it in Acts—where primarily Caucasians—Japhetites, who are coming into the church—that the earliest church folks who were Jews, of course, first, did not want to accept these people unless they became Jews—unless they adopted the ceremonial customs, practices, and the ways of Jews. And there was quite a church deception about it, and the upshot of it was, with the leadership of the Apostle Paul that the Apostle Peter took it that it was agreed that a Jew should remain as Jew, and the others should remain in their customs and practices, as they had remained. That there was not to be—and this had nothing to do with their salvation—but that they were not to cross these lines or to force the crossing of them.

Now, Paul was speaking to the Grecks on Mars Hill, and speaking to them of God's creation, and their accountability to Him, and he said that God made the races and that He determined the times before appointed and the bounds of their habitation.

In other words, the various conditions—times, dwelling place, and so forth—were determined by God and as was pointed out this morning, Paul said that this was done that they might seek the Lord, that they might feel after Him, that there seemed to be a recognition that—of—the more the races were mixed, the less racial respect and the less fear of God there would be.

And this the Bible was supposed to.

Q. Do you feel that the—that reference to bounds and habitations has anything to do with geographical separation?

A. I think it does that, but I think it does more than that.

Q. But you certainly do not believe that the races—the Bible teaches that the races must be in separate countries, upon separate geographical regions?

A. I would not make it a matter of dogma or doctrine, but I somehow wouldn't be surprised if in the original plan of God that races were to grow up in separate communities that would remain that way.

Q. Now, what is the Biblical authority for the fact that the descendants of—that Orientals, Egyptians, Indians, and Negroes are descendants of Ham, as opposed to descendants of Shem, or Japheth?

A. All right, I'm not going to read you any lengthy passage here.

In Genesis, Chapter Ten, starting with verse two, you have listed the sons of Japheth; Gomar, Magog, Madai, Javan, and Tubal, Meshech, and Tiras.

And then it goes on to give some of the descendants there.

Now, various Bible scholars have traced a number of these things out. I could dig out some reference books, if I had all my library here and show you this.

Where these family groups are identified as to who they are. Now, you go on down further, you have the sons of Ham. Cush, Mizraim, Phut, Canaan, and Canaan—some of these are much more easy to recognize—Canaanites were in the land when the Children of Israel went there and it engulfed them, destroyed them utterly and so forth. There's none of those in existence today.

I think Cush is generally recognized as being the father of the Egyptians and some of the other groups of that area, and so it would be with some of these others as far as where they come from. Now, this——

Q. (Interposing) Genesis traces all that out?

A. It gives three generations at least here, and men who have dealt with these matters have dug this out, I think one book in particular that does some of this—that comes to mind right now—is the book called, *The Two Babylons,* by the name—a man by the name of Heslop, H-e-s-l-o-p.

There are a number of commentaries beginning with some of the writings of the early church fathers—back in the first or second century and on to the present time that deal with the development as to who these are.

For instance, Magog is both generally accepted to be the Russian people, and——

Q. (Interposing) Now, when you say generally accepted, are you saying generally accepted upon—by Bible scholars?

A. By Bible scholars, generally it's accepted that the evidence is there that Magog, or some of his descendants were the people or—who now inhabit the area of Russia.

Q. You aren't just talking about fundamentalist religious scholars, are you?

A. No, I'm talking—well, I'm talking about men who believe the Bible, and who take It literally, and who do not questions It's authority or authenticity.

Q. So you are talking about fundamentalist religious scholars?

A. By and large, yes.

Now, some of these men may not call themselves fundamentalists, but they would be in the same camp as far as that's concerned.

Q. Dr. Heslop or Mr. Heslop would be one?

A. Right, yes.

Q. So in your mind there's no question that the Negro, for example, is a Hamite, rather than a Japhethite?

A. Right.

Q. Japhethite?

A. Right.

Q. By the same token, there's no question in your mind that a Greek is a Japhethite?

A. Right, right.

Q. Is an Italian a Japhethite?

A. Yes, yes.

Q. All Caucasians are Japhethites?

A. Right, most of these same men who would deal with this have also taught the principle of racial separation as maintained in the Bible. It should be practiced by God's people.

Q. Okay, are Orientals from Ham, is that correct?

A. Right.

Q. That's generally accepted?

A. Generally accepted, yes.

Q. And the Negroes, also?

A. Right.

Q. American Indians, what are they?

A. You might find a little more question about it, but I think generally they're accepted as Hamitics.

Q. How about Pakistanis?

A. They're related to Indian peoples and most of the natives of that area of the world are generally accepted as having been Hamitic peoples who migrated there.

Q. How about Lebanese?

A. I think the Lebanese are predominantly Semitic.

Q. They're Hebrews?

A. They are related to Hebrews. but they have—I think there's been some intermarriage with Hamitic in a large

grouping, but I may be wrong—I may be wrong. Maybe I'm answering too quickly there, but I think I'm right in that.

I mentioned a while ago the Arabs are at least half Semitic.

Q. I believe in your sermon you said that the Arabs are the sons—descendants of Ishmael, is that correct?

A. Right.

Q. Now was that an interacial marriage?

A. Yes, Ishmael was the son of Abraham, who on the advice of his wife when she had given him no children married an Egyptian who was Hamitic, and God told him that the child of that marriage would not be the son through whom the promises—heirs—or the promises that God gave would come.

Q. And the Bible tells you that the Arabs—the present day Arabs are the product of that marriage?

A. Right, you can trace it down in the Old Testament and bring it right on up to the present time.

Do you employ Mohammedanism? One of the things that Mohammedanism does is it looks to Abraham through Ishmael as their spiritual and physical forebearer, even as Judaism looks to Abraham through Isaac.

[Dep. p. 8, 1.5—p.25, 1.22]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, the defendant hereby moves the Court for an order in the nature of a partial summary judgment, for the reason that there is no material fact genuinely in dispute between the parties as to the issue of the plaintiff's entitlement to qualification as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 and the issue of whether the plaintiff's provision of lodging to its teachers is remuneration requiring the withholding of federal income taxes and the payment of F.I.C.A. and F.U.T.A. taxes, for the reasons more fully set forth in the accompanying brief in support of this motion. For purposes of this motion, the defendant incorporates into the record the discovery presently on file with the Court (composed of depositions and answers to interrogatories), the plaintiff's complaint, and the affidavit of John A. Townsend (with attached exhibits) accompanying this motion.

THOMAS P. MCNAMARA
United States Attorney

By: .....
Assistant United States Attorney

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES Now, Goldsboro Christian Schools, Inc., Plaintiff, through its undersigned attorneys, pursuant to Rule 56 of the Federal Rules of Civil Procedure moves the Court for a partial summary judgment in plaintiff's favor that for the years in issue in this litigation the plaintiff was an "organization described in Section 501(c)(3)" for purposes of qualifying for the exemptions from Federal Insurance Contribution Act taxes contained in Section 3121(b)(8)(B) of the Internal Revenue Code and the Federal Unemployment Tax Act taxes contained in Section 3306(c)(8). Said motion is made on the grounds that as to this issue there is no genuine issue as to any material fact and the plaintiff is entitled to a partial summary judgment as a matter of law.

In support of said motion plaintiff shows unto the Court the verified complaint, depositions, answers to interrogaries and other documents filed with this Court. Defendant has moved this Court for partial summary judgment as to the same issue. Plaintiff's brief in support of this motion and in opposition to defendant's motion was filed simultaneously herewith.

Oral argument on plaintiff's motion is requested at the convenience of the Court.

WHEREFORE, plaintiff prays that the Court enter partial summary judgment in plaintiff's favor and finding and adjudging that, for the years in issue in this litigation, the plaintiff was "an organization described in Section 501(c)(3)" of the Internal Revenue Code for purposes of

qualifying for the exemptions contained in Section 3121(b)(8)(B) and Section 3306(c)(8) of the Internal Revenue Code.

This the ..... day of ....., 1977.

Claude C. Pierce

William G. McNairy

Edward C. Winslow III

Attorneys for the Plaintiff

Of Counsel:

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(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

75-0020-CIV-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

Decided September 14, 1977

Before HEMPHILL, *District Judge*.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Printed in Petition for a Writ of Certiorari at page 5a.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

(Title omitted in printing)

STIPULATION

(Filed January 27, 1978)

For the purposes of this action, it is hereby stipulated by and between the parties as follows:

1. On April 25, 1977, the Acting Assistant Attorney General of the Tax Division of the United States Department of Justice notified counsel for the plaintiff by letter that the Internal Revenue Service had agreed to abate all Federal Unemployment Tax Act (FUTA) assessments for the period January 1, 1969 through December 31, 1970 and all Federal Insurance Contributions Act (FICA) assessments for the period January 1, 1969 through November 30, 1970. The April 25, 1977 letter from the Department of Justice to William G. McNairy is attached to this Stipulation as Exhibit A. The Internal Revenue Service made this decision to abate FICA and FUTA taxes assessed against the plaintiff for 1969 and most of 1970 because the Internal Revenue Service did not announce the change of its position with regard to the tax-exempt status of private schools which maintain a discriminatory admissions policy until July 10, 1970 and did not begin enforcing this change of position until November 30, 1970. A copy of the July 10, 1970 News Release announcing the change of the Internal Revenue Service's position on the tax-exempt status of private schools which maintain a discriminatory admissions policy is attached to this Stipulation as Exhibit B.

2. As a result of the concession by the Internal Revenue Service referred to in paragraph 1 hereof, the plaintiff, Goldsboro Christian Schools, Inc., is entitled to a credit of

$784.71, which represents the FICA taxes and interest paid by the plaintiff to the Internal Revenue Service, all as set forth in paragraph 14 of the Complaint, for the period January 1, 1969 through November 30, 1970 as follows:

Period	Employee Tax Imposed by Section 3101	Employer Tax Imposed by Section 3111	Interest	Total
1st Quarter 1969	$57.24	$57.24	$37.62	$152.10
2nd Quarter 1969	41.92	41.92	26.28	110.12
3rd Quarter 1969	19.24	19.24	11.78	50.26
4th Quarter 1969	55.46	55.46	32.28	143.20
1st Quarter 1970	41.00	41.00	22.64	104.64
2nd Quarter 1970	30.56	30.56	15.96	77.08
3rd Quarter 1970	25.30	25.30	12.44	63.04
4th Quarter 1970	34.23	34.23	15.81	84.27*
			Total	$784.71

* The Internal Revenue Service concession includes October and November only—taxable for December.

3. As a result of the concession by the Internal Revenue Service referred to in paragraph 1 hereof, the Government's Counterclaim for the unpaid FICA taxes and interest assessed by the Internal Revenue Service against the plaintiff, for the period from January 1, 1969 through November 30, 1970, in the amount of $31,171.69, should be denied. Paragraph 2 of the Government's Counterclaim re-

quested judgment for such unpaid FICA taxes, but in fact also included in the figures listed therein assessed unpaid income tax withholding amounts. Since only the FICA portion of the 1969 through November 30, 1970 assessments are to be abated, and not the income tax withholding amounts for such periods (see paragraph 8, *infra*), the amount of the assessed FICA taxes to be abated is $31,171.69, broken down as follows:

Period	FICA Tax Assessment	Interest Assessment	Plaintiff's Payments	Balance of Assessments to Be Abated
1st Quarter 1969	$2,574.90	$ 820.41	$152.10	$ 3,243.21
2nd Quarter 1969	1,944.89	590.50	110.12	2,425.27
3rd Quarter 1969	1,741.25	515.38	50.26	2,206.37
4th Quarter 1969	4,013.83	1,127.83	143.20	4,998.46
1st Quarter 1970	4,209.29	1,120.31	104.64	5,224.96
2nd Quarter 1970	3,402.27	853.92	77.08	4,179.11
3rd Quarter 1970	3,118.24	735.86	63.04	3,791.06
4th Quarter 1970	4,248.63	938.89	84.27	5,103.25*
			Total	$31,171.69

* The Internal Revenue Service concession includes October and November only—taxable for December.

4. As a result of the concession by the Internal Revenue Service referred to in paragraph 1 hereof, the plaintiff, Goldsboro Christian Schools, Inc., is entitled to a credit in

the amount of $374.20, which represents the FUTA taxes, interest and penalties paid by the plaintiff to the Internal Revenue Service, all as set forth in paragraph 14 of the Complaint, for the period January 1, 1969 through December 31, 1970 as follows:

Period	Tax Imposed by Section 3301	Interest	Penalty	Total
1969	$130.20	$33.85	$32.55	$196.60
1970	119.92	27.70	29.98	177.60
			Total	$374.20

5. As a result of the concession by the Internal Revenue Service referred to in paragraph 1 hereof, the Government's Counterclaim is denied for the FUTA taxes, interest and penalties assessed by the Internal Revenue Service against the plaintiff, all as set forth in paragraph 3 of the Government's Counterclaim, for the period January 1, 1969 through December 31, 1970, in the amount of $11,557.54 as follows:

Period	FUTA Tax Assessment	Penalty Assessment	Interest	Plaintiff's Payments	Balance of Assessment
1969	$3,000.34	$ 750.09	$ 843.05	$196.60	$4,396.88
1970	4,988.66	1,247.17	1,102.43	177.60	7,160.66
				Total	$11,557.54

• • • • • • • • • •

8. As a result of plaintiff's failure to make certain income tax withholding remittances for the periods 1969 through 1972, and to pay FICA taxes for December 1970, and all of 1971 and 1972, with respect to gross income paid by plaintiff to its employees (including the fair rental value of furnished housing), unpaid assessments of FICA and

income withholding taxes are correct, due and owing in the total amount of $96,167.40, broken down as follows:

Period	FICA Tax Assessment	Income Withholding Assessment	Interest Assessment	Plaintiff's Payments	Balance of Assessments Due & Owing
1st Quarter 1969	$ - 0 -	$ 464.43	$ 147.97	$ 41.85	$ 570.55
2nd Quarter 1969	- 0 -	411.13	124.83	41.38	494.58
3rd Quarter 1969	- 0 -	506.87	150.03	21.13	635.77
4th Quarter 1969	- 0 -	662.47	186.15	40.11	808.51
1st Quarter 1970	- 0 -	669.91	186.28	41.92	844.27
2nd Quarter 1970	- 0 -	645.44	162.00	36.38	771.06
3rd Quarter 1970	- 0 -	916.04	216.17	45.35	1,086.86
4th Quarter 1970	$2,177.06	1,054.77	714.19	42.13*) 41.73)	3,862,16
	FICA and Income Withholding Combined				
1st Quarter 1971		8,575.23	1,767.79	193.38	10,149.64
2nd Quarter 1971		7,063.63	1,349.06	171.10	8,241.59
3rd Quarter 1971		6,502.07	1,144.28	156.42	7,489.93
4th Quarter 1971		11,576.47	1,863.65	235.43	13,204.69

Period	FICA Tax Assessment	Income Withholding Assessment	Interest Assessment	Plaintiff's Payments	Balance of Assessments Due & Owing
1st Quarter 1972		11,841.90	1,730.70	226.58	13,346.02
2nd Quarter 1972		10,093.77	1,322.15	191.08	11,224.84
3rd Quarter 1972		8,951.10	1,038.20	169.85	9,819.45
4th Quarter 1972		12,557.72	1,285.88	231.30	13,612.30
				Total	96,162.22

9. As a result of plaintiff's failure to pay FUTA taxes in 1971 and 1972 with respect to wages of its employees (including the fair rental value of furnished housing), unpaid FUTA tax assessments are correct, due and owing in the total amount of $21,182.50 broken down as follows:

Period	FUTA Tax Assessed	Delinquency Penalty Assessed	Interest Assessed	Plaintiff's Payments	Balance of Assessments Due & Owing
1971	$7,069.89	$1,767.47	$1,138.16	$190.98	$ 9,784.54
1972	8,572.17	2,143.04	865.67	182.92	11,397.96
				Total	21,182.50

10. As a result of the credits set forth in paragraphs 2 and 4 above, and the additional unpaid assessments set forth in paragraphs 8 and 9 above, judgment should be

entered for the United States for the total amount of $116,190.99, broken down by year as follows:

1969	$ 1,857.13
1970	6,057.72
1971	48,870.39
1972	59,400.57
	$116,185.81

This ..... day of January, 1978.

GEORGE M. ANDERSON
United States Attorney

By:

/s/ LEONARD J. HENZKE, JR.
Leonard J. Henzke, Jr.
Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

/s/ CLAUDE C. PIERCE
Claude C. Pierce
Counsel for the Plaintiff
Goldsboro Christian Schools, Inc.

Of Counsel:

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HUMPHREY & LEONARD
Suite 1400 Wachovia Building
Post Office Drawer U
Greensboro, North Carolina 27402
Telephone (919) 373-8850

Exhibit

—

Exhibit A

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

April 25, 1977

MCB:JFM:LJHenzke:dlm
5-54-674

William G. McNairy, Esquire
Brooks, Pierce, McLendon, Humphrey
& Leonard
P.O. Box Drawer U
Greensboro, North Carolina 27402

Re: Goldsboro Christian Schools v. United States
(Civ. No. 75-0020 — Civ-8; E.D. N.C.)

Dear Mr. McNairy:

This is to confirm the telephone conversation of April 22, 1977, between yourself and Mr. Leonard J. Henzke, Jr. of this office, respecting the above-entitled case. As Mr. Henzke explained, the Internal Revenue Service has agreed to abate all Federal Unemployment Tax Act (FUTA) assessments for the time period ending on or before December 31, 1970. In addition, it has been determined that all Federal Insurance Contributions Act (FICA) assessments will be abated for the time period prior to November 30, 1970. Please note that these abatements cover only the FICA and FUTA taxes which depend on plaintiff's status as a Section of 501(c)(3) exempt organization; they do not cover income tax withholding liabilities respecting the value of lodging furnished to employees.

The precise amount of taxes which is covered by these abatements is being computed, and we will notify you when the computation is complete. Of course, no actual refund will be made until the Government's counterclaim for pe-

riods after December 31, 1970 respecting FUTA, and November 30, 1970 respecting FICA, has been adjudicated.

Please feel free to telephone Mr. Henzke at (202) 739-2933 if you have any questions regarding this matter.

Sincerely yours,

MYRON C. BAUM
Acting Assistant Attorney General
Tax Division

By: /s/ JOHN F. MURRAY
John F. Murray
Chief, Civil Trial Section,
Southern Region

cc: Honorable F. T. Dupree, Jr.
United States District Judge
P.O. Box 27585
Raleigh, North Carolina 27611

Honorable Robert W. Hemphill
United States District Judge
P.O. Box 27585
Raleigh, North Carolina 27611

Carl L. Tilghman, Esquire
United States Attorney
P.O. Box 26897
Raleigh, North Carolina 27611

Exhibit B

INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
Tel. (202) WO 4-4091

For Release: 4:00 PM, EDT, Fri.
July 10, 1970

IR3 Announces Position on Private Schools

Washington, D.C.—The Internal Revenue Service announced today that it has been concluded it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.

The Internal Revenue Service will proceed without delay to make favorable rulings of exemption immediately available to private schools announcing racially nondiscriminatory admissions policies and to deny the benefit of tax-exempt status and deductibility of contributions to racially discriminatory private schools.

The Service said that favorable rulings given to private schools in the past will remain outstanding where the school is able to show that it has racially nondiscriminatory admissions policies.

All private schools with favorable rulings outstanding will receive a written inquiry from the District Director of Internal Revenue and it is anticipated that in most instances evidence of a nondiscriminatory policy can be supplied by reference to published statements of policy or to the racial constituency of the student body.

Where a school fails to establish that it has a racially nondiscriminatory admissions policy, an outstanding ruling of exemption will be withdrawn. However, a school seeking to clarify or change its policies and practices will be given

a reasonable opportunity to do so in order to retain its ruling of federal tax exemption. In any event, full opportunity to present evidence and be heard will be provided in accordance with usual revenue procedures and the right to appeal to the courts will be available. Similar principles will be followed in acting upon requests made by new schools for rulings.

• • • • • • • • • • •

4:00 PM, EDT
7/10/70

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

Civil Action No. 75-0020-CIV-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

JUDGMENT

(Filed May 7, 1980)

It is hereby ORDERED, ADJUDGED and DECREED that defendant-counterclaimant, the United States of America, shall recover from the plaintiff, Goldsboro Christian Schools, Inc. the sum of $116,190.99, plus interest and costs as allowed by law.

Plaintiff's motion for attorneys' fees is hereby DENIED.

Signed this 7th day of May, 1980.

/s/ ROBERT M. HEMPHILL
United States District Judge
Presiding by Designation

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WILSON DIVISION

File Number: 75-0020-Civ-8

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

NOTICE OF APPEAL

Notice is hereby given that Goldsboro Christian Schools, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 7th day of May, 1980.

July 1, 1980

/s/ WILLIAM G. MCNAIRY
William G. McNairy
Attorney for Goldsboro Christian Schools, Inc.

Of Counsel:

BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD
1400 Wachovia Building
Post Office Drawer U
Greensboro, North Carolina 27402
Telephone: (919) 373-8850

(Certificate of service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1473

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson. Robert W. Hemphill, Senior District Judge.

Argued December 3, 1980 Decided February 24, 1981

Before BUTZNER, *Circuit Judge*, FIELD, *Senior Circuit Judge*, and MURNAGHAN, *Circuit Judge*.

OPINION

Printed in Petition for a Writ of Certiorari at page 1a.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1473

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of North Carolina.

JUDGMENT

Printed in Petition for a Writ of Certiorari at page 53a.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1473

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ORDER (DENYING PETITION FOR REHEARING)

Printed in Petition for a Writ of Certiorari at page 55a.

Opposition

Supreme Court, U.S.
FILED
SEP 9 1981
ALEXANDER L. STEVAS
CLERK

Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1980

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

ERNEST J. BROWN
ROBERT S. POMERANCE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioners, nonprofit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies and other racially discriminatory practices qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954.

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TABLE OF AUTHORITIES

Cases:

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Bob Jones University v. *Simon*, 416 U.S. 725	5, 6
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McLaughlin v. *Florida*, 379 U.S. 184	15
Norwood v. *Harrison*, 413 U.S. 455	14-15
Prince Edward School Foundation v. *United States*, 478 F. Supp. 107, aff'd by unpublished order, No. 79-1622, cert. denied, No. 80-484 (Feb. 23, 1981)	13, 15
Runyon v. *McCrary*, 427 U.S. 160	12, 15

Constitution, statutes and regulation:

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First Amendment, Free Exercise and Establishment Clauses 7, 10, 14, 15, 16
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Section 601, 42 U.S.C. 2000d 12

Declaratory Judgment Act, 28 U.S.C. (& Supp. III) 2201 6
Internal Revenue Code of 1954 (26 U.S.C.):

Section 170(a) 2, 1a
Section 170(c)(2) 2, 11, 13, 1a-2a
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Treasury Regulations on Income Tax, Section 1.501(c)(3)-1(d) (26 C.F.R.) 2, 2a-4a

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No. 81-1. The order of the district court (Pet. App. 5a-18a) is reported at 436 F. Supp. 1314. The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

No. 81-3. The opinion and order of the district court (Pet. App. A38-A71) are reported at 468 F. Supp. 890. The opinion of the court of appeals (Pet. App. A1-A37) is reported at 639 F.2d 147.

JURISDICTION

No. 81-1. The judgment of the court of appeals (Pet. App. 53a) was entered on February 24, 1981, and the court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc on April 7, 1981 (Pet. App. 55a). The petition for a writ of certiorari was filed on July 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No. 81-3. The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on April 8, 1981 (Pet. App. A100-A101). The petition for a writ of certiorari was filed on July 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 501(a), 501(c)(3), and 3306(c)(8) of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 3 (No. 81-3). The relevant provisions of Section 170(a) and (c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) and of Section 1.501(c)(3)-1(d) of the Treasury Regulations on Income Tax (26 C.F.R.) are set forth at Appendix, *infra*, 1a-3a.

STATEMENT

Although the petition in *Goldsboro Christian Schools, Inc.* was docketed first in this Court, we begin with the statement of facts in *Bob Jones University* because, on the question presented here, the

court of appeals rendered its principal opinion in that case and decided *Goldsboro Christian Schools* on the authority of *Bob Jones University.*

A. Bob Jones University—No. 81-3

1. Petitioner is a nonprofit organization incorporated in 1952 under the laws of South Carolina. As set forth in its certificate of incorporation, its purpose is " 'to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures * * *' " (Pet. App. A2-A3, A40-A41). Petitioner provides instruction for students from kindergarten through college and graduate school (Pet. App. A3, A41; A. 68-69, 136, 200).[1] At the college level, it operates a school of education, a school of fine arts, a school of religion, a college of arts and sciences, and a school of business (A. 69). In its graduate schools, it offers courses in art, music, speech, radio and television, cinema, religion, and education (A. 200). It enrolls about 5,000 students and offers approximately 50 accredited degrees.[2] It

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[1] "A." refers to the separately bound record appendix filed in the court of appeals.

[2] Until 1972 the Veterans Administration recognized petitioner as an educational institution offering courses of study suitable for the education of veterans who were recipients of subsidies under the educational benefits program administered by the Veterans Administration. See *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 600-601 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this period, petitioner's courses of study were certified to be suitable for the education of veterans by the South Carolina State Board of Education, using criteria prescribed by federal statute. *Ibid.* See 38 U.S.C. 1771 *et seq.* In November

also offers a nondegree, noncredit program entitled Institute of Christian Service. The purpose of that program is to teach the principles of the Bible and to train Christian character (Pet. App. A3, A41). All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians. Students are screened as to their religious beliefs and their conduct is strictly regulated (Pet. App. A3-A4).

From its inception, petitioner has, based upon religious doctrine, maintained a racially restrictive admissions policy and a policy forbidding interracial dating and interracial marriage. Prior to 1971, petitioner excluded blacks entirely from enrollment. From 1971 until 1975, married black persons and members of other minority races or ethnic groups were not excluded from enrollment, but petitioner continued to deny admission to unmarried blacks unless the applicant had been a staff member of petitioner for at least four years (Pet. App. A4, A43). See *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this latter period, petitioner's doctrinal policy did not specifically require the exclusion of blacks,

---

1972, the Veterans Administration terminated the right of otherwise eligible veterans to receive veterans' benefits for education at Bob Jones University based upon a determination by the Veterans Administration that petitioner had failed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and with the Veterans Administration regulations implementing the statutory requirement of nondiscrimination in federally assisted programs. See *Bob Jones University* v. *Johnson*, *supra*, 396 F. Supp. at 598-599. Upon petitioner's complaint for review, the district court and the court of appeals sustained the administrative order of termination. *Bob Jones University* v. *Johnson*, *supra*.

but denying admission to unmarried blacks was, in petitioner's judgment, the best means of implementing its prohibition against interracial dating and marriage (Pet. App. A43).

Following the court of appeals' decisions in April and May 1975, in *Bob Jones University* v. *Johnson*, 529 F.2d 514 (4th Cir. 1975), and in *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), petitioner once again revised its admissions policy. After May 29, 1975, petitioner generally permitted unmarried blacks as well as married blacks to enroll as students. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage (Pet. App. A4, A43-A44). It also established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate petitioner's rules and prohibitions against interracial dating (Pet. App. A4, A44).

Until 1970, the Internal Revenue Service recognized petitioner as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). See *Bob Jones University* v. *Simon*, 416 U.S. 725, 735 (1974). By letter dated November 30, 1970, the Internal Revenue Service advised petitioner that thereafter it would not recognize as exempt, or allow deductibility of contributions to, any private school maintaining a racially discriminatory admissions policy (Pet. App. A39, A87). Petitioner responded that it did not admit black students and that it had no intention of altering that policy. The Internal Revenue Service therefore commenced administrative proceedings leading

to the revocation of petitioner's exemption.[3] See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 735. In January 1976, the Service issued a final notice of revocation to petitioner, effective as of December 1, 1970 (Pet. App. A40, A87-A88, A89).

2. Seeking to reinstate its exemption, petitioner brought this action in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975 (Pet. App. A3, A40).[4] The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975 (*ibid.*). Following a trial, the district court held that petitioner qualified for tax exemption under Section 501(c)(3) of the Code as an institution organized and operated exclusively for religious and educational purposes (Pet. App. A45, A71), and that petitioner was not required to demonstrate a nondiscriminatory policy in order so to qualify (Pet. App. A45-A71).

The court of appeals reversed (Pet. App. A1-A17), with one judge dissenting (Pet. App. A18-A37). It rejected the district court's hypothesis that petitioner

---

[3] While the administrative proceedings preliminary to the revocation of its exemption were pending, petitioner filed a suit for injunctive relief to prevent the Internal Revenue Service from taking final action on the revocation. *Bob Jones University* v. *Simon*, *supra*. This Court unanimously held that the action was barred by the Anti-Injunction Act (26 U.S.C. (& Supp. III) 7421(a)) and by the Declaratory Judgment Act (28 U.S.C. (& Supp. III) 2201), but suggested (416 U.S. at 746) the refund suit procedure ultimately employed by petitioner here.

[4] Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. 3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3).

was entitled to tax exempt status because it is a "religious" institution and qualifies under the separately enumerated "religious" category of Section 501(c)(3). The court rejected "[t]his simplistic reading of the statute" as one that "tears section 501(c)(3) from its roots" (Pet. App. A7). Citing with approval the three-judge district court's decision in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, 404 U.S. 997 (1971), the court concluded that Section 501(c)(3) must be viewed against its background in the law of charitable trusts. Thus, the court of appeals agreed with the *Green* decision (330 F. Supp. at 1156-1160) that, to be eligible for tax exempt status, "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy" (Pet. App. A7-A8; footnote omitted). Here, it stated, petitioner's racial policies violated clearly defined public policy, rooted in the Constitution and the decisions of this Court condemning racial discrimination. Since there is a government policy against subsidizing racial discrimination in education, public or private, the court of appeals held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status * * *" (Pet. App. A10).

In so holding, the court rejected petitioner's argument that the application of the Service's nondiscrimination policy to petitioner violates the Free Exercise and Establishment Clauses of the First Amendment. Assuming that petitioner's racial discrimination is motivated by sincere religious beliefs, the court noted that the Internal Revenue Service's policy would not prohibit petitioner from adhering to its teachings or force any individual student to violate his beliefs (Pet. App. A13-A14). The court further concluded that "the uniform application of the [Service's] rule

to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original).

B. Goldsboro Christian Schools—No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. is a nonprofit organization incorporated in 1963 under the laws of North Carolina. Its articles of incorporation provide that its purpose is " 'to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *' " (Pet. App. 6a). At least since 1969, petitioner has maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve (A. 10).[5] During that period, petitioner has satisfied the requirements of North Carolina for secular education in private schools.[6]

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[5] "A." refers to the separately bound record appendix filed in the court of appeals.

[6] Pursuant to N.C. Gen. Stat. § 115-255 (1978 repl.), the State of North Carolina regulates and supervises all nonpublic schools within the State serving children of secondary-school age, or younger, "to the end that all children shall become citizens who possess certain basic competencies necessary to properly discharge the responsibilities of American citizenship." In accordance with that statute, all such nonpublic schools—

> shall meet the State minimum standards as prescribed in the course of study, and the children therein shall be taught the branches of education which are taught to the children of corresponding age and grade in the public schools * * *.

Submissions to the State indicate that petitioner requires its high school students to take one Bible-related course during each semester. The remaining course requirements and offerings, as reflected in those submissions, are indicative of secular subjects. Whether the subject of the course is secular or Bible-related, petitioner's practice is to begin each class with a prayer. This practice is in keeping with petitioner's overall purpose, and the desire of its founders, to provide a secular private school education in a religious setting. Based upon an interpretation of the Bible that it purports to follow, petitioner has maintained a racially discriminatory admissions policy since the time of its incorporation. It has occasionally admitted some noncaucasian, but no black, students (Pet. App. 6a-7a).

Petitioner has never received recognition from the Internal Revenue Service as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). On audit, the Commissioner of Internal Revenue determined that petitioner did not qualify as a Section 501(c)(3) organization, and therefore did not qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code. The Commissioner accordingly assessed FICA and FUTA taxes against petitioner. After making partial payment, petitioner instituted this action in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 in federal witholding, FICA, and FUTA taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period (Pet. App. 5a, 7a-8a).

2. On the parties' cross motions for summary judgment, the district court ruled that the Internal Revenue Service had properly denied petitioner exempt status under Section 501(c)(3), and the tax benefits associated with qualification as a Section 501(c)(3) organization because petitioner's policy of racial discrimination violated the declared public policy of the United States (Pet. App. 14a). For purposes of adjudicating the motion, the court assumed that petitioner's racially discriminatory admissions policy was based upon a valid religious belief (Pet. App. 7a). It concluded, however, that denying petitioner the benefits of a Section 501(c)(3) tax exemption did not abridge any rights guaranteed petitioner under the Fifth Amendment to the Constitution or under the Establishment or Free Exercise Clauses of the First Amendment (Pet. App. 12a-13a).[7] The court of appeals affirmed, with one judge dissenting. Treating the case as "identical" with *Bob Jones University*, the court of appeals upheld

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[7] During the pendency of the proceedings in the district court, the government agreed to abate all FUTA assessments against petitioner for periods ending on or before December 31, 1970, and to abate all FICA assessments against petitioner for periods ending before November 30, 1970 (A. 123). The government made this concession because the Internal Revenue Service's announcement that it would no longer accord the benefits of tax exemption and deductibility of contributions to racially discriminatory private schools (I.R.S. News Releases of July 10, 1970, & July 19, 1970, *reprinted in* 7 Stand. Fed. Tax Rep. (CCH) ¶¶ 6790, 6814 (1970)), was effective as of November 30, 1970 (A. 116-117). See Internal Revenue Code of 1954, Section 7805(b) (26 U.S.C.). The government accordingly stipulated that it was entitled to recover only $116,190.99 upon its counterclaim, and the district court entered judgment in its favor in that amount (A. 122, 141).

the Internal Revenue Service's action on the authority of its decision in that case (Pet. App. 1a-3a).

The court observed (Pet. App. 2a):

> It is rare that any two cases are identical twins. Nevertheless, as it happens, there is identity for present purposes between the instant case and the case of *Bob Jones University* * * * which has just been handed down. There the taxpayer was held not to be entitled to the § 501(c)(3) exemption. In some respects, insofar as decision here is concerned, the resemblance of Goldsboro to Bob Jones University is stronger than would be the case the other way round. That is so since Goldsboro altogether prohibits admission of blacks. The University permits them to enter, but forbids certain interracial associations, especially dating and marriage.
>
> The complete and impeccable treatment by Judge Hall in *Bob Jones University* makes it supererogatory for us to discuss the issue of tax exempt status under § 501(c)(3). For that aspect we simply affirm the district court for the reasons advanced in the Bob Jones University case.

ARGUMENT

1. The decisions below correctly held that the Internal Revenue Service acted within its statutory authority in revoking petitioners' tax-exempt status under Section 501(c)(3) of the Code.

The Internal Revenue Service since 1970, the District of Columbia Circuit, and the court of appeals below have uniformly ruled that a private school does not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954, or as an eligible donee of charitable contributions deductible under Section 170(c)(2) of the Code, unless

it establishes that its admissions and educational policies are operated on a nondiscriminatory basis. This position derives its force from the congressional purpose underlying the charitable exemption provisions in the Internal Revenue Code. That purpose, to aid organizations that further some public benefit, is served by the nondiscrimination requirement. See H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). It derives also from the federal government's commitment to the eradication of racial discrimination in education manifested both in the Constitution and in many federal statutes and the national policy prohibiting public subsidy of racially discriminatory educational institutions, whether public or private. See, *e.g.*, *Runyon* v. *McCrary*, 427 U.S. 160 (1976); Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d; Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981; *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310, 323-324 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).

Given that public policy and national commitment, the Internal Revenue Service acted well within its statutory authority in concluding that a "religious" organization such as petitioners must satisfy the "charitable" requirement of Section 501(c)(3) in order to qualify for tax exemption. Educational institutions such as petitioners that engage in racially discriminatory practices are not "charitable" as that term is understood at common law. *Green* v. *Connally*, 330 F. Supp. 1150, 1156-1160 (D.D.C.), aff'd, 404 U.S. 997 (1971). Accordingly, the charitable exemption provisions do not countenance federal tax benefits to organizations operated for educational purposes that discriminate against students or appli-

cants on the basis of race. *Green* v. *Connally*, *supra*, 330 F. Supp. at 1179; *Prince Edward School Foundation* v. *United States*, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, No. 80-484 (Feb. 23, 1981) (nonreligious private school denied tax-exempt status for failure to make requisite showing that it maintained a racially nondiscriminatory admissions policy where no black child had been admitted for a period of almost 20 years; directors' religious belief in the value of segregated education does not excuse failure to make requisite showing of nondiscriminatory policy).

2. Contrary to petitioner Bob Jones University's argument (Pet. 9), the nondiscrimination principle applied to private schools by the courts and by the Internal Revenue Service does not conflict with Congress' understanding of the requirements imposed by the Internal Revenue Code with respect to racial discrimination. By the Act of Oct. 20, 1976, Pub. L. No. 94-658, Section 2(a), 90 Stat. 2697, Congress added to the Code, "in view of national policy," the provision now contained in Section 501(i), which explicitly denies exempt status to a social club if its charter or any of its written policy statements provides for "discrimination against any person on the basis of race, color, or religion." The accompanying S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976), reflects Congress' intent to apply to social clubs the same antidiscrimination rule involved here. Congress was well aware of the Service's policy implemented six years earlier that discrimination on account of race is inconsistent with an educational institution's tax-exempt status under Section 501(c)(3) and also with its status as a donee of deductible charitable contributions under Section 170(c)(2). Though, as

noted, *infra*, the Congress has temporarily barred the employment of proposed new procedures to enforce the policy of the Internal Revenue Service, it has at the same time sanctioned the continuation of the substantive and procedural policies set forth in Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

3. Both Bob Jones University (Pet. 11-15) and Goldsboro Christian Schools (Pet. 23-28) seek to excuse their failure to satisfy the nondiscrimination principle on the ground that their discriminatory practices are the outgrowth of sincere religious faith. But, as the court of appeals correctly concluded, the unquestioned First Amendment right to free religious belief and exercise does not carry with it a guarantee of any person's or corporation's entitlement to tax-exempt status. As the court below pointed out in *Bob Jones University* (81-3 Pet. App. A15-A16), the Service's policy avoids excessive entanglement with religion by applying its policy to all religiously operated schools (as well as nonreligious schools). Moreover, the Service's policy does not compel petitioners or any other religious institution to alter their religious teachings, or compel their students to violate their beliefs. By requiring petitioners to show, as a condition to retaining the benefits of tax exemption, that they are operating under a racially nondiscriminatory policy, the Internal Revenue Service therefore did not encroach upon any activity entitled to affirmative constitutional protection.[8] See *Norwood* v. *Harrison*, 413 U.S. 455,

[8] Petitioner Bob Jones University's 1975 revision of its admissions and disciplinary rules rendered it no more eligible for the benefits of federal tax exemption. As the court of appeals correctly pointed out (81-3 Pet. App. A9-A10), petitioner's policy of denying admission to partners in an interracial marriage and of expelling students who date or marry

464 n.7, 468-470 (1973); *Runyon* v. *McCrary*, 427 U.S. 160, 175-179 (1976); cf. *Green* v. *Connally*, *supra*, 330 F. Supp. at 1165-1169; *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 604-608 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975).

4. Although there is no conflict of appellate decisions and we believe that the decisions of the court of appeals are correct, we do not oppose the petitions in these cases. The Internal Revenue Service is currently meeting substantial resistance from church-related and religious schools to enforcement of its position that such institutions are not entitled to tax-exempt status under Section 501(c)(3) if they engage in racially discriminatory practices. This resistance is premised on the argument raised by petitioners in these cases that the Service's revocation or denial of tax-exempt status violates the First Amendment rights of such institutions. For example, in *Green* v. *Regan*, No. 1355-69 (D.D.C.), the Service is under an injunctive order to investigate certain private schools in Mississippi to determine whether they are entitled to tax exemption. There are 29 church-operated schools which have been identified as potentially subject to the court's order, and 12 of those schools have invoked the First Amendment as a bar to compliance with the Service's request for the

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outside of their race rests, as did its prior policies, upon an invidious distinction drawn according to race. See *Loving* v. *Virginia*, 388 U.S. 1, 11-12 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). Moreover, petitioner Goldsboro Christian Schools concedes (Pet. 6) that it "has maintained a racially discriminatory admissions policy since its founding." Thus, the fact of petitioners' racially discriminatory policies is beyond dispute. Cf. *Prince Edward School Foundation* v. *United States*, cert. denied, No. 80-484 (Feb. 23, 1981) (Rehnquist, J., dissenting).

information necessary to complete its investigation. Pursuant to the government's motion in *Green*, the court has suspended its injunctive order as it relates to the church schools pending resolution of the First Amendment claims.

Because of the sensitivity of claims that the Internal Revenue Service's administration of the tax laws violates the First Amendment right of schools to the free exercise of religion, and because of the strong conviction with which such claims are often asserted and adhered to, the Service has been impeded in its efforts to achieve even-handed enforcement in this area against religious institutions. Reliance on the authority of its published rulings or even on the decisions below of a single court of appeals has been inadequate to avoid unseemly confrontations with religious claims in the Service's investigations. Moreover, as petitioner Goldsboro Christian Schools observes (Pet. 18-19), Congress has introduced an element of uncertainty into enforcement procedures by prohibiting the Service from using any funds appropriated to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church operated schools under Section 501(c)(3) * * * unless in effect prior to August 22, 1978." See Ashbrook Amendment (Section 103) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559. While the Ashbrook Amendment does not apply to the instant cases because the Internal Revenue Service acted here in accordance with policies and procedures established long before August 22, 1978 (see, *e.g.*, Rev. Proc. 75-50, 1975-2 Cum. Bull. 587), it necessarily raises some questions concerning the scope of the Service's pres-

ent authority in this area and further complicates the problem of achieving even-handedness in enforcement.

The Service accordingly doubts that denial of certiorari in these cases would substantially enhance compliance with its investigative efforts in this area. Since there is no likelihood of a ruling by another court of appeals in the near future on these First Amendment questions of substantial public importance to both the Service and the institutions involved, we believe that a definitive decision by this Court will dispel the uncertainty surrounding the propriety of the Service's ruling position and foster greater compliance on the part of the affected institutions.

CONCLUSION

The petitions for writs of certiorari should be granted. The Court may wish to consolidate the cases for argument.

Respectfully submitted.

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SEPTEMBER 1981

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* The Solicitor General is disqualified in these cases.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. (1970 ed.)):

Section 170. Charitable, etc., contributions and gifts.

(a) *Allowance of deduction.*—

(1) *General rule.*—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

* * * * *

(c) [as amended by Section 201, Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487] *Charitable Contribution Defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of——

(2) A corporation, trust, or community chest, fund, or foundation—

(A) created or organized in the United States or in any possession thereof, or under the laws of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * * *

Treasury Regulations on Income Tax (26 C.F.R.)

§ 1.501(c)(3)-1 *Organizations organized and operated for religious, charitable, scientific testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.*

* * * * *

(d) *Exempt purposes*—(1) *In general.* (i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:

(a) Religious,
(b) Charitable,

(c) Scientific,
(d) Testing for public safety,
(e) Literary,
(f) Educational, or
(g) Prevention of cruelty to children or animals.

* * * * *

(iii) Since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. If, in fact, an organization is organized and operated exclusively for an exempt purpose or purposes, exemption will be granted to such an organization, regardless of the purpose or purposes specified in its application for exemption. For example, if an organization claims exemption on the ground that it is "educational," exemption will not be denied, if, in fact, it is "charitable."

(2) *Charitable defined.*—The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social

welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

* * * * *

(3) *Educational defined.*—(i) In general.—The term "educational", as used in section 501(c)(3), relates to—

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

* * * * *

(ii) Examples of educational organizations.—The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example (1). An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

* * * * *

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Petitioner's Brief

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No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS

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QUESTIONS PRESENTED

1. Whether Goldsboro Christian Schools, Inc., a private church-related school, is precluded from qualifying as a tax-exempt educational organization under 26 U.S.C. § 501(c)(3) because it maintains a racially discriminatory admissions policy which is based on its sincere religious beliefs?

2. Whether the denial of tax-exempt status to Goldsboro Christian Schools, Inc. under 26 U.S.C. § 501(c)(3) solely because it maintains a racially discriminatory admissions policy based on its sincere religious beliefs is an unconstitutional infringement of its guarantees under the Religion Clauses of the First Amendment?

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No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit appears as the appendix to the Petition for Writ of Certiorari at page 1a ("Pet. ——"); the Judgment of the Fourth Circuit appears at Pet. 53a. The district court's Order is reported at 436 F.Supp. 1314 (E.D.N.C. 1977) and appears at Pet. 5a. The Judgment of the district court, filed on May 7, 1980, appears in the Joint Appendix at page 115 ("J.A. ——").

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case and entered Judgment on Feb-

ruary 24, 1981. (Pet. 53a). By an Order dated April 7, 1981, the Fourth Circuit denied petitioner's timely Petition for Rehearing. (Pet. 55a). The Petition for a Writ of Certiorari was filed on July 2, 1981 and was granted on October 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

Sections 501(a) and (c)(3) of the Internal Revenue Code (1971) (26 U.S.C. §§ 501(a) and (c)(3) (1971)) provide in pertinent part:

> *Sec. 501. Exemption from tax on corporations, certain trusts, etc.*
>
> (a) *Exemption from taxation.* — An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . .
>
> • • • •
>
> (c) *List of exempt organizations.* — The following organizations are referred to in subsection (a):
>
> • • • •
>
> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Section 3121(b)(8)(B) of the Internal Revenue Code (1971) (26 U.S.C. § 3121(b)(8)(B) (1971)) provides in pertinent part:

> *Sec. 3121. Definitions.*
>
> (b) *Employment.* — For purposes of this chapter, the term "employment" means any service performed . . . either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except that such term shall not include —
>
> • • • •
>
> (8)(B) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a), ...

Section 3306(c)(8) of the Internal Revenue Code (1971) (26 U.S.C. § 3306(c)(8) (1971)) provides in pertinent part:

> *Sec. 3306. Definitions.*
>
> (c) *Employment.* — For purposes of this chapter, the term "employment" means . . . (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, . . . except —
>
> • • • •
>
> (8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a); . . . .

The pertinent Treasury Department Regulations, Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959) (26 C.F.R. § 1.501(c)(3)-1(d)(3) (1959)), provide:

> (3) *Educational defined* — (i) *In general.* The term "educational", as used in Section 501(c)(3), relates to —

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) *Examples of educational organizations.* The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example (1). An organization, such as a primary or secondary school, a college, or a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

STATEMENT OF THE CASE

Petitioner Goldsboro Christian Schools, Inc.,[1] brought this action against the United States, pursuant to 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422, to recover $1,972.10 of Federal Insurance Contributions Act ("FICA") taxes and $748.10 of Federal Unemployment Tax Act ("FUTA") taxes, which it had paid for the years 1969 through 1972. (J.A. 14-17). The United States counterclaimed for $160,073.96 of FICA and FUTA taxes allegedly due it for these same years. (J.A. 61-63).

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[1] In accord with Rule 28.1, Goldsboro Christian Schools, Inc. states that it is a corporation which has no parent company or subsidiary; however, it is an affiliate of the Second Baptist Church of Goldsboro located in Goldsboro, North Carolina.

At issue is the determination by the Internal Revenue Service ("IRS") that Goldsboro Christian Schools, Inc. ("Goldsboro") does not qualify as a tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code ("Code") because Goldsboro maintains a racially discriminatory admissions policy, even though this policy is based on its sincere religious beliefs. The determination of whether Goldsboro is an organization described in Section 501(c)(3) of the Code will resolve the issue of Goldsboro's liability for FICA taxes and FUTA taxes. If Goldsboro is an organization described in Section 501(c)(3) of the Code, then it is exempt from FICA taxes (26 U.S.C. §3121(b)(8)(B)) and from FUTA taxes (26 U.S.C. §3306 (c)(8)).

Goldsboro was organized as a non-profit corporation exclusively for the purpose of operating a private, fundamentalist religious school in Goldsboro, North Carolina. (Pet. 6a). The district court observed that the Second Baptist Church of Goldsboro had figured prominently in Goldsboro's establishment and operation and provides Goldsboro with "physical facilities and services of various Church employees . . . without cost." (Pet. 6a-7a). The court noted the general religious character of Goldsboro, as set forth in its Articles of Incorporation, which state its purpose to be:

> [T]o conduct an institution or institutions of learning for the general education of *Youth* in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures; combatting all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testaments); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save

men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace of God. (Pet. 6a).

During the years at issue, Goldsboro maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve. (Pet. 6a-7a; J.A. 6). All classes at Goldsboro begin with a prayer, and Goldsboro requires each high school student to take one Bible-related course each semester. (Pet. 7a).

Goldsboro, which is an integral part of the religious mission of the Second Baptist Church of Goldsboro, maintains a racially discriminatory admissions policy as a matter of religious conviction. The district court noted that, Goldsboro's discriminatory policy is "based upon [its] interpretation of the Bible." (Pet. 7a). The court assumed for purposes of deciding the summary judgment motions that Goldsboro's "racially discriminatory admissions policy is based upon a valid religious belief." (Pet. 7a).

In its Order on Cross-Motions for Summary Judgment, the district court held that, in order for an organization to qualify for tax-exempt status under Section 501(c)(3), it must not "violate clearly declared public policy." (Pet. 10a). The district court said this requirement is "inherent in and compelled by both rules of statutory construction and congressional intent" even though "there is no specific language in the statute" to that effect. (Pet. 10a-11a). Because Goldsboro maintains a racially discriminatory policy, it therefore violates "public policy"and is thus not a Section 501(c)(3) organization. (Pet. 14a). In addition, the district court held that the IRS's denial of tax-exempt status did not violate Goldsboro's constitutional rights under the First Amendment Religion Clauses. (Pet. 12a-13a).

On appeal, the Fourth Circuit stated that "[Goldsboro], on religious grounds, denies admission to blacks."

(Pet. 1a). The Fourth Circuit then described this case as an "identical twin" to *Bob Jones University* v. *United States*, 639 F.2d 147 (4th Cir. 1980), and in a *per curiam* opinion, affirmed the decision of "the district court for the reasons advanced in the Bob Jones University case." (Pet. 2a). Judge Field dissented. This case has been consolidated with the *Bob Jones University* case, No. 81-3, for review by this Court.

The Fourth Circuit held in the *Bob Jones University* case that an organization must be "charitable" in the common law sense and thus could not violate public policy in order to qualify as a tax-exempt organization under Section 501(c)(3) of the Code. The Fourth Circuit found that Bob Jones University's racially discriminatory policies violated federal public policy; the Fourth Circuit, therefore, held that the IRS properly revoked Bob Jones University's tax-exempt status. Moreover, the Fourth Circuit found that the government's interest in eliminating racial discrimination is compelling. Consequently, the Fourth Circuit went on to hold that even if the revocation of tax-exempt status impinged upon Bob Jones University's religious freedoms, the revocation of tax-exempt status did not violate the Religion Clauses of the First Amendment.

In a dissenting opinion in the *Bob Jones University* case, Judge Widener stated that the majority had misconstrued Section 501(c)(3) by insisting that the various types of organizations listed therein also qualify as common law "charitable" organizations in order to qualify for tax-exempt status. Judge Widener would have construed Section 501(c)(3) to grant tax-exempt status to each type of organization enumerated in the statute. Because Bob Jones University falls within one of those classes, Judge Widener would have held that the IRS does not have the power to revoke Bob Jones University's tax-exempt status. Finally, Judge Widener stated that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimina-

tion in the context of private, non-tax-funded religious institutions.

SUMMARY OF ARGUMENT

Section 501(c)(3) of the Code grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes." Goldsboro qualifies as a tax-exempt educational organization under the terms of this statute and the applicable Treasury Department Regulations.

The IRS contends that Goldsboro must also comply with the "federal public policy" against racial discrimination in order to qualify for tax-exempt status. Application of the rules of statutory construction clearly demonstrates, however, that there is no merit in the IRS's position.

In addition, the legislative history of Section 501(c)(3) reveals a total absence of any intent on the part of Congress to deny tax-exempt status to schools that maintain racially discriminatory admissions policies. On the other hand, the position advanced by the IRS that Goldsboro must maintain racially nondiscriminatory policies in order to qualify for tax-exempt status under Section 501(c)(3) raises serious constitutional questions under the First Amendment Religion Clauses. Thus, based on this Court's holding in *NLRB* v. *Catholic Biship of Chicago,* 440 U.S. 490, 507 (1979), Section 501(c)(3) must be construed to permit Goldsboro to qualify as a tax-exempt organization, thereby avoiding the necessity of having to "resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

Moreover, the decision of the Fourth Circuit upholding the IRS's denial of tax-exempt status to Goldsboro on the ground that its racially discriminatory admissions policy violates federal public policy gave judicial approval to an unconstitutional exercise of legislative powers by an

administrative agency in the executive branch of government. If Congress should determine that religious schools which maintain racially discriminatory policies should not qualify as tax-exempt organizations under Section 501(c)(3), then Congress must amend the statute to deny tax-exempt status to such organizations. This is precisely the procedure followed by Congress when it denied tax-exempt status under Section 501(c)(3) to certain Communist organizations on the grounds of public policy. This same legislative process should be followed here.

If the Fourth Circuit's decision is not overturned, the IRS will have successfully denied tax-exempt status to a religious school that practices unorthodox, unpopular and minority views which the IRS—and not the Congress—has decided violate federal public policy. If the IRS has the power to deny tax-exempt status to religious schools on the grounds that their racially discriminatory policies violate federal public policy, then it would appear that the IRS also has the power to deny tax-exempt status to any organization, educational or otherwise, that violates some public policy sought to be enforced by the IRS. If this is permitted, the end result would be that the specific criteria for granting an organization tax-exempt status under Section 501(c)(3) would be constantly changing, and these changes would take place at the whim of the IRS. Thus, subjective and arbitrary judgments by IRS bureaucrats would be substituted for objective standards enacted by Congress.

Finally, if this Court determines that the IRS has the statutory authority to deny tax-exempt status to organizations which maintain racially discriminatory admissions policies, this Court must then balance the competing interests of church and state to determine whether the denial of tax-exempt status to Goldsboro violates its First Amendment rights. Goldsboro is a pervasively religious school that discriminates out of a firmly held religious belief that separation of the races is scripturally mandated. Ap-

plication of the IRS's policy to Goldsboro would severely burden the free exercise of that belief.

On the other hand, the secular value underlying the IRS policy sought to be enforced in this case is different in both kind and degree from those government regulations which this Court has found in the past to outweigh religious liberty. The IRS policy is not directed at any practice that poses a substantial threat to public safety, peace or order, and, more importantly, that policy has never been codified by Congress nor delineated by any court. Finally, the creation of a religious exemption to the IRS's policy would have only a minor effect on the IRS's goal of eradicating discrimination, and that goal could be pursued more directly through private actions under the civil rights laws.

In this case, the scales tip heavily in favor of religious freedom. Thus, the Court should hold that the Free Exercise Clause prohibits the IRS from denying tax-exempt status to private, religious schools, such as Goldsboro, that maintain racially discriminatory policies based on sincere religious beliefs.

ARGUMENT

I.

THE FOURTH CIRCUIT ERRED IN HOLDING THAT GOLDSBORO DOES NOT QUALIFY AS A TAX-EXEMPT ORGANIZATION DESCRIBED IN SECTION 501(c)(3) BECAUSE IT MAINTAINS A RACIALLY DISCRIMINATORY ADMISSIONS POLICY.

Section 501(c)(3) of the Code grants tax-exempt status to organizations "organized and operated exclusively for religious, charitable, . . . or educational purposes." Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959) defines an "educational" organization to include "a primary or secondary school . . . which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students."

During the years at issue, Goldsboro maintained a regularly scheduled curriculum, a regular faculty and a regularly enrolled student body for kindergarten and grades one through twelve and was certified by the North Carolina Department of Public Instruction to be an "approved nonpublic school." (Pet. 7a, J.A. 6-7). Goldsboro is operated as part of the religious mission of the Second Baptist Church of Goldsboro. (Pet. 6a-7a). Thus, Goldsboro clearly qualifies as a tax-exempt organization under Section 501 (c)(3) and Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

The IRS does not dispute that during the years at issue in this case—1971 and 1972—Goldsboro satisfied all of the express requirements of Section 501(c)(3). Nonetheless, the Fourth Circuit held, as contended by the IRS, that Goldsboro failed to qualify as a tax-exempt organization under Section 501(c)(3) solely because its racially discriminatory admissions policy, which is based on its sincere religious beliefs, violates public policy. The Fourth Circuit relied primarily on *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C.) (three-judge court), *aff'd per curiam sub nom. Coit* v. *Green*, 404 U.S. 997 (1971) in reaching its decision.

In order to place this case in proper prospective, it is necessary to briefly review the history of the *Green* litigation and the vacillating positions taken by the IRS over the years with respect to the tax-exempt status of private schools that maintain racially discriminatory policies.

Prior to 1965, the IRS routinely granted tax-exempt status to private schools which maintained racially discriminatory admissions policies. Then, from 1965 to 1967, the IRS maintained a freeze on Section 501(c)(3) applications of educational organizations with discriminatory admissions policies. This freeze was terminated on August 2, 1967, when the IRS issued a press release stating that if such organizations did not receive any unconstitutional

state aid they were entitled to tax-exempt status under Section 501(c)(3). The IRS's position set forth in the 1967 press release was attacked in a lawsuit brought by a group of taxpayers and their children who were attending public schools in Mississippi. *See Green* v. *Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970) (three-judge court).

In its early responses in the *Green* litigation, the IRS asserted not only that it should grant tax-exempt status to private segregated schools, but also that it was required to do so. However, before a final decision was entered, the IRS changed its position and announced, in a news release dated July 10, 1970, that private schools which maintain racially discriminatory admissions policies no longer qualify for tax-exempt status under Section 501(c)(3). (J.A. 113-14).

Because the IRS changed its position with regard to the tax-exempt status of racially discriminatory private schools before the district court in *Green* reached its final decision, this Court has made clear that its affirmance in *Green* lacks the precedential weight of a case involving a truly adversary proceeding.[2] But more importantly, the district court in *Green* left open the very issue involved in this

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[2] In *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n. 11 (1974), this Court said:

> The question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review in this Court, and we do not reach that question today. Such schools have been held not to qualify under § 501(c)(3) in *Green* v. *Connally*, 330 F.Supp. 1150 (D.C.) (three-judge court), *aff'd per curiam sub nom. Coit* v. *Green*, 404 U.S. 997 (1971). As a defendant in *Green*, the Service initially took the position that segregative private schools were entitled to tax-exempt status under § 501(c)(3), but it reversed its position while the case was on appeal to this Court. Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy.

case—the tax-exempt status of religious schools that practice racial discrimination because of their religious beliefs.[3]

In this case, the IRS initially assessed FICA and FUTA taxes against Goldsboro for the years 1969 through 1972, even though Goldsboro clearly qualified as a tax-exempt educational organization in 1969 and for most of 1970 under the IRS policy announced on August 2, 1967. (J.A. 61-63). Because Goldsboro did, in fact, qualify as a Section 501 (c)(3) organization under the IRS policy in effect prior to July 10, 1970, the IRS decided to abate the FICA and FUTA taxes assessed against Goldsboro for the period prior to November 30, 1970, when the IRS began enforcing the change in position announced in the July 10, 1970 press release. (J.A. 111-12).

Consequently, the IRS has acknowledged that Goldsboro qualified as a tax-exempt educational organization under Section 501(c)(3) of the Code prior to July 10, 1970, but now the IRS contends that Goldsboro does not qualify as a tax-exempt organization for 1971 and 1972 solely because the IRS—which is simply an agency in the executive branch of the government—and not the Congress decided that, as a July 10, 1970, tax-exempt status would no longer be granted to private schools which maintained racially discriminatory policies.

The reasoning relied on by the IRS in issuing the July 10, 1970 press release, as well as the justification advanced for denying tax-exempt status to Goldsboro, is that all organizations described in Section 501(c)(3) must also be "charitable" in the common law sense. The IRS then

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[3] In *Green* v. *Connally*, 330 F.Supp. at 1169, the district court wrote:

> We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion.

argues that in order to qualify as a common law charity, the purpose of the organization must not be contrary to public policy. The IRS then contends that racially discriminatory policies are contrary to public policy, even if those policies are based on sincere religious beliefs. Thus, the IRS concludes that Goldsboro does not qualify as a common law charity[4] and therefore is not entitled to tax-exempt status under Section 501(c)(3). *See* Rev. Rul. 71-447, 1971-2 C.B. 230.

An examination of the statute itself, as well as the legislative history of Section 501(c)(3), clearly establishes that there is no support for the position advanced by the IRS that, in order for an educational or religious organization to qualify for tax-exempt status under Section 501(c)(3), the organization must also be "charitable" in the common law sense. To the contrary, the legislative history of Section 501(c)(3) and the applicable rules of statutory construction clearly establish that Goldsboro does, in fact, qualify as a tax-exempt organization under Section 501(c)(3).

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[4] The Government's statement of the requirements for qualifying as a common law charity is incorrect. It was made clear many years ago in cases such as *Pennsylvania Co. for Insurance* v. *Helvering*, 66 F.2d 284 (D.C. Cir. 1933), and *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108 (3rd Cir. 1941), that the determination of whether an organization violates federal public policy is not the test for determining whether the organization qualifies as a common law charity. Rather the test is whether the purpose of the organization promotes some public benefit or good to humanity.

In view of the undisputed facts in this case, it is patently absurd for the IRS to contend that Goldsboro does not satisfy the threshold test of providing that degree of benefit or good to humanity necessary to qualify as a common law charity. The IRS has consistently misapplied the test for a common law charity by confusing the difference between "public policy" and "public benefit".

A. Application Of The Rules Of Statutory Construction Establishes That Goldsboro Qualifies As A Tax-Exempt Organization Under Section 501(c)(3).

This Court has repeatedly held that "[i]n matters of statutory construction, it is appropriate to begin with the words of the statute itself," *Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. ——, 101 S.Ct. 1571, 1580 (1981), and that the words of a statute, including revenue acts, should be interpreted where possible in their ordinary, everyday senses. *Malat* v. *Riddell,* 383 U.S. 569, 571 (1966); *Hanover Bank* v. *Commissioner,* 369 U.S. 672, 687 (1962).

Section 501(c)(3) describes several different types of organizations which are entitled to tax-exempt treatment, all of which are connected by the disjunctive "or". By use of the word "or", Congress obviously intended to grant tax-exempt status to an organization if it is organized and operated for any one of the enumerated purposes. Separate references are made to "religious", "educational" and "charitable". These separate references do not support the position now advanced by the IRS that Congress intended that all organizations must also be "charitable" (as that term is used at common law) in order to receive tax-exempt status. In *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 339 (1979), this Court said that the "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." Most significantly, the IRS's own regulations follow the construction of Section 501(c)(3) dictated by the plain words of the statute by stating that an organization is exempt "if it is organized and operated exclusively for one or more" of the enumerated purposes. Treas. Reg. § 1.501(c)(3)-1(d)(1)(i) (1959).

Not only does the position advocated by the IRS in this case, which was adopted by the Fourth Circuit, ignore the plain, unambiguous words of the statute, but the IRS's

position also violates the fundamental rule of statutory construction which requires that a statute be construed if possible to give separate effect to each word in it and no one part of a statute should be interpreted in a manner so as to render another part of the same statute redundant. *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

The word "charitable" in its common law sense, as expressed by Lord McNaughten in the famous case of *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583, comprises four principal divisions: "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." If Congress had intended to use the word "charitable" in its common law sense, it would have been unnecessary to separately refer to "educational" and "religious" organizations. The latter two terms are obviously included in the first. Yet, the construction of Section 501(c)(3) advocated by the IRS makes the separate reference to "educational" and "religious" organizations completely superfluous. This construction of the statute clearly violates the requirement that Section 501(c)(3) be construed to give effect to each word in it and that no one part of the statute be interpreted so as to render another part of the statute redundant. As Professor Boris I. Bittker recently noted, the construction advanced by the IRS makes "the reference in IRC § 501(c)(3) to 'educational' purposes . . . subservient . . . to 'charitable' purposes, so that a school or college cannot rest its case for tax exemption solely on the statutory reference to 'educational purposes.'" 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 100.1.2, at 100-5 (1981).

Neither the words of the statute, the applicable Treasury Department Regulations nor the basic rules of statutory construction provide any support for the construction of Section 501(c)(3) advocated by the IRS and adopted by

the Fourth Circuit. Goldsboro satisfies all the express requirements of the statute and the applicable Treasury Department Regulations, and thus qualifies as a tax-exempt educational organization under Section 501(c)(3).

B. The Legislative History Of Section 501(c)(3) Establishes That Congress Did Not Intend To Deny Tax-Exempt Status To Religious Schools Such As Goldsboro.

This Court has repeatedly held that, in construing the validity of an IRS interpretation of a statute, the courts should inquire as to whether the IRS's policy sought to be enforced "is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent", *National Muffler Dealers Association, Inc.* v. *United States*, 440 U.S. 472, 477 (1979); and, if not, courts should also consider "the consistency of the Commissioner's interpretation and the degree of scrutiny Congress has devoted to the [policy] during subsequent re-enactments of the statute." *Id. Accord, Rowan Companies, Inc.* v. *United States*, 452 U.S. ——, 101 S.Ct. 2288, 2292-93 (1981). The interpretation of Section 501(c)(3) sought to be enforced by the IRS is obviously not a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. Nor has the IRS maintained a consistent position with respect to the tax-exempt status of organizations which maintain racially discriminatory policies. Moreover, except for the Ashbrook Amendment (discussed in Part I.C. *infra*), Congress has never scrutinized the vacillating positions taken by the IRS over the years with respect to this issue.

More importantly, in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), this Court held that, in the absence of a clear congressional intent to the contrary, courts should construe a federal statute in a manner so as to avoid having to "resolve difficult and sensitive questions

arising out of the guarantees of the First Amendment Religion Clauses." The doctrine enunciated in *Catholic Bishop* is applicable in any situation in which the interpretation of a federal statute creates possible First Amendment conflicts. *See, e.g., St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. ——, 101 S.Ct. 2142, 2147 (1981).

The initial determination to be made under *Catholic Bishop* is not whether a First Amendment violation has, in fact, occurred, but whether a violation might occur if the suggested interpretation of the statute is adopted by the court. Goldsboro's racially discriminatory policies are based on its sincere religious beliefs. (Pet. 7a, J.A. 40-45). Thus, the position advanced by the IRS that Goldsboro must maintain racially nondiscriminatory policies in order to qualify for tax-exempt status under Section 501(c)(3) obviously raises serious constitutional questions under the First Amendment Religion Clauses. *See* Part II *infra*. The legislative history of Section 501(c)(3), on the other hand, reveals a total absence of any intent on the part of Congress to deny tax-exempt status to religious schools that maintain racially discriminatory policies based on sincere religious beliefs. Thus, Section 501(c)(3) must be construed to permit Goldsboro to qualify as a tax-exempt organization, thereby avoiding the necessity of having to "resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556.[5] That original statutory provision provided:

> [N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes.

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[5] This corporate income tax act was later declared unconstitutional by this Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

There are several indications that Congress did not intend to incorporate the common law of charitable trusts into this corporate income tax statute. First, there was no federal common law. Second, the common law of charitable trusts varied from state to state (not all states had adopted the Statute of Charitable Uses, 43 Eliz.I, ch. 4 (1601)). Finally, from the words of the statute, it is clear that Congress intended to distinguish religious and educational corporations from charitable corporations. The listing of three separate categories of exempt organizations irresistibly points to the conclusion that Congress intended for the term "charitable" to describe organizations that provide relief of the poor.

After the ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. Section II(G)(A) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual.

This legislation broadened the exemption to include "scientific" corporations. However, if Congress had intended for the word "charitable" to be used in its common law sense, the inclusion of the term "scientific" in the list of exempt purposes would have been unnecessary because "scientific" corporations were regarded as "charitable" under the common law. *See Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. at 583.

In the Tariff Act of 1913, Congress also added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, no income of a charity could inure to the benefit of a private person. *See* 4 A. Scott, *The Law of Trusts* § 376 (2d ed. 1956). Thus, the inclusion of a requirement to that effect in the statute was unnecessary if Con-

gress had intended for all organizations to qualify as common law charities in order to be exempt from taxation.

The conclusion that Congress did not incorporate the common law of charitable trusts into the exemption is further supported by the IRS's contemporaneous construction of the early revenue acts. In a ruling issued in 1921, the IRS stated that charitable trusts were *not* exempt from taxation under the predecessor provisions of Section 501(c)(3) contained in the Revenue Acts of 1913, 1916 and 1918. A.R.M. 104, 4 C.B. 262 (1921). This same position is contained in the regulations promulgated under the Revenue Act of 1918. Treas. Reg. 45, Art. 517 (Revenue Act of 1918).

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 254, § 231(6), 40 Stat. 1057, added to the list of exempt corporations those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 98, § 231(6), 42 Stat. 227, further expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. Goldsboro again points out that these additions would have been unnecessary if Congress had intended to use the word "charitable" in its broad common law sense. Moreover, in 1923, the IRS stated in I.T. 1800, II-2 C.B. 152, 153 (1923), that the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 meant relief for the poor:

> It will be seen that "charitable" in this broad sense includes, among other things, education, religion, relief of the poor, social service, and civic or public benefactions. On the other hand, "charitable" in its popular and ordinary sense pertains to the relief of the poor. . . .
>
> In section 231(6) of the Revenue Acts of 1918 and 1921 the organizations enumerated are religious, charitable, scientific, literary, and educational, . . . It seems obvious that the *intent must have been to use the word*

> *"charitable" in section 231(6) in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic, or social welfare organizations.* Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable, scientific, literary, or educational . . . ." (Emphasis added).

The term "charitable" was construed by the Commissioner in 1923 exactly as Goldsboro contends that it should be construed here. Likewise, in interpreting the meaning of the word "charitable" under the early revenue acts, the courts held that the term should be construed in its narrow and restricted sense to mean relief for the poor. *See, e.g., Schuster* v. *Nichols,* 20 F.2d 179 (D.Mass. 1927).

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932.[6] Moreover, the regulations issued by the IRS under the Revenue Act of 1924 defined the term "charitable" to mean "relief of the poor":

> Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor.

Treas. Reg. 65, Art. 517 (Revenue Act of 1924). The regulations issued by the IRS under the Revenue Acts of 1926, 1928 and 1932 continued to define the term "charitable" to mean "relief of the poor."[7]

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[6] Revenue Act of 1924, ch. 176, § 231(6), 43 Stat. 253; Revenue Act of 1926, ch. 20, § 231(6), 44 Stat. 9; Revenue Act of 1928, ch. 562, § 103(6), 45 Stat. 791; Revenue Act of 1932, ch. 154, § 103(6), 47 Stat. 169.

[7] Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932).

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, exempted from taxation the identical categories of organizations that were exempt under prior revenue acts, but the Revenue Act of 1934 added the requirement that no substantial part of the activities of an organization could involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement was unnecessary if Congress had intended for all organizations to qualify as common law charities in order to be exempt from taxation. *See* 4 A. Scott, *The Law of Trusts* § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 740, § 101(6), 49 Stat. 1648, and the Revenue Act of 1938, ch. 554, § 101(6), 52 Stat. 447, carried forward the same exemption. In addition, the regulations promulgated under these Revenue Acts continued to define the term "charitable" as "relief of the poor."[8]

In enacting the Internal Revenue Code of 1939, ch. 1, 53 Stat. 1 ("1939 Code"), Congress continued to exempt from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938.[9] During the fifteen years in which the 1939 Code remained in effect, the IRS issued

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[8] Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938).

[9] Section 101(6) of the 1939 Code exempted the following organizations from taxation:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise, attempting to influence legislation.

three sets of regulations, each of which defined the term "charitable" to mean relief of poverty.[10]

Section 501(c)(3) of the Internal Revenue Code of 1954, ch. 591, 68A Stat. 163 (the "1954 Code") continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, with the exception that the 1954 Code added to the list of exempt organizations those organizations which are organized and operated for the purpose of "testing for public safety". In addition, Congress tightened the restrictions on political activities of tax-exempt organizations.[11] Again, these changes would have been unnecessary if Congress had intended to use the word "charitable" in its common law sense.

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from sections 101 and 421 of the 1939 Code. *No change in substance has been made* except that employees' pension trusts, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 4025, 4034 (emphasis added). The changes between Section 101(a) of the 1939 Code and Section 501(c)(3) of the 1954 Code described above originated in the Senate; the House accepted these changes in conference. *See* S. Rep. No. 1662, 83d Cong., 2d

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[10] Each set of regulations provided in pertinent part:

> Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor.

Treas. Reg. 103, § 19.101(6)-1 (1939 Code); Treas. Reg. 111, § 29.101(6)-1 (1939 Code); Treas Reg. 118, § 39.101(6)-1(b) (1939 Code).

[11] The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Sess. 310 (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 4621, 4950; H.R. Rep. No. 2543, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 5280, 5306.

The legislative history of Section 501(c)(3) clearly demonstrates that from the very beginning Congress has consistently used the term "charitable" in its restricted sense to mean "relief of the poor." The IRS also interpreted the term "charitable" to mean "relief of the poor" until 1959.[12] There is absolutely no indication that Congress ever intended that an "educational" or "religious" organization must also be "charitable" in the common law sense in order to qualify for tax-exempt status under Section 501(c)(3). To the contary, it is clear that over the years, Congress has developed a definition of the types of organizations that are exempt from tax which can be uniformly applied without reference to the common law of the various states. Moreover, the position now advanced by the IRS is obviously not "a substantially contemporaneous construction of the statute by those presumed to be aware of Congressional intent," *National Muffler Dealers Association, Inc.* v. *United States,* 440 U.S. at 477, but is simply the last in a series of vacillating positions taken by the IRS with respect to the tax-exempt status of schools which maintain racially discriminatory admissions policies. Finally, and most significantly, the legislative history of Section 501(c)(3) reveals a total absence of any intent

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[12] In the regulations originally proposed under the 1954 Code, the definition of the term "charitable" was similar to the definition contained in the regulations promulgated under the 1939 Code:

> Organizations formed and operated exclusively for charitable purposes include generally organizations for the relief of poverty, distress, or other conditions of similar public concern.

21 Fed. Reg. 460, 464 (1956). It was not until the final regulations were issue in 1959 that the IRS interpreted the term "charitable" for the first time in the broader, common law sense. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

on the part of Congress to deny tax-exempt status to religious schools that maintain racially discriminatory policies based on their sincere religious beliefs. On the other hand, the IRS's position, which has been adopted by the Fourth Circuit, raises serious First Amendment issues. Therefore, in accordance with the mandate of *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. at 507, this Court should "decline to construe [Section 501(c)(3)] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" and should hold that Goldsboro qualifies as a tax-exempt organization under Section 501(c)(3).

C. The Attempt By The IRS To Deny Tax-Exempt Status To Goldsboro Violates The Doctrine Of Separation Of Powers.

The decision of the Fourth Circuit upholding the IRS's denial of tax-exempt status to Goldsboro on the ground that its racially discriminatory policies violate federal public policy sanctioned an unconstitutional exercise of legislative powers by an administrative agency of the executive branch of government.

The language of Section 501(c)(3) is clear and unambiguous, and the IRS admits that Goldsboro satisfies all the express requirements of the statute for qualification as a tax-exempt organization. The IRS's additional requirement that Goldsboro maintain racially nondiscriminatory policies in order to qualify for tax-exempt status is therefore nothing more than an attempt by the IRS to amend the statute by administrative action. This it cannot do.

This Court has consistently refused to permit administrative agencies to rewrite the laws enacted by Congress. For example, in *Manhattan General Equipment Co.* v. *Commissioner,* 297 U.S. 129, 134-35 (1936), this Court stated:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and

> regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.
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> • • • •
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> . . . The *statute* defines the rights of the taxpayer and fixes a standard by which such rights are to be measured.

(Emphasis added); *accord, United States* v. *Larionoff*, 431 U.S. 864, 873 n.12 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon* v. *United States*, 381 U.S. 68, 74-75 (1965). Until Congress amends the statute to deny tax-exempt status to organizations that maintain racially discriminatory policies, Goldsboro cannot be denied that status under Section 501(c)(3) by administrative action of the IRS.

Moreover, this Court has repeatedly held that, when the language of a statute is clear, the courts do not have the power under the guise of statutory construction to repeal or amend that statute even though they may disagree with the result; rather it is their function to give the natural and plain meaning to the statute as passed by Congress. In *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625-26 (1978), this Court said:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. . . . Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did [years ago] . . . , but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

Similarly, in *Evans* v. *Abney*, 396 U.S. 435, 447 (1970), this Court stated:

> The responsibility of this Court . . . is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

Accord, United States v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 199 (1952); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 599 (1951).

Although the Fourth Circuit ignored the doctrine of separation of powers, Congress has expressed considerable reservation about the IRS's authority to deny tax-exempt status to organizations which maintain racially discriminatory policies. In the Ashbrook Amendment to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 559, Congress prohibited the IRS from using any funds appropriated therein to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) . . . unless in effect prior to August 22, 1978." The House Report on this bill stated in pertinent part:

> This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service procedures ought to be to clarify these laws, not to expand them.

H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 14-15 (1979).

The sponsor of the Amendment, Congressman Ashbrook, argued:

> For the administrative branch to create such a policy without direction from Congress is a violation of the doctrine of the separation of powers.
>
> • • • •
>
> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal government to seek denial of tax-exempt status. . . .

> Such policy determinations, when made without the action of Congress, become dangerous encroachments upon congressional authority.

125 Cong. Rec. H5879-80 (daily ed., July 13, 1979) (remarks of Congressman Ashbrook).

Although the Ashbrook Amendment does not apply to this case because it was pending prior to the August 22, 1978 effective date of the amendment, this legislation nevertheless expresses Congress' view that the issue of the tax-exempt status of private, religious, or church-operated schools which maintain racially discriminatory policies is a matter to be resolved by Congress and not by the IRS.[13]

In view of the IRS's vacillation with respect to the tax-exempt status of schools that maintain racially discriminatory policies, particularly during the years at issue in this case, this Court should follow the policy enunciated in *United States* v. *Byrum*, 408 U.S. 125, 135 (1972):

> Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned. Legislative enactments, on the other hand, although not always free from ambiguity, at least afford the taxpayers advance warning.

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[13] This amendment was the result of compromises on the floors of both the House of Representatives and the Senate. Several Congressmen voiced opposition to the enforcement policies of the IRS in effect. Others objected only to proposed policies of the IRS. The amendment was clearly designed to maintain the status quo until Congress had an opportunity to study this issue and to decide what action was needed.

If Congress should determine that organizations which maintain racially discriminatory policies should not qualify as tax-exempt organizations under Section 501(c)(3), it should amend the statute to deny tax-exempt status to such organizations. This is precisely the procedure followed by Congress when it denied tax-exempt status under Section 501(c)(3) to certain Communist organizations on the grounds of public policy.[14] Congress also followed this procedure when it denied tax-exempt status to certain social clubs otherwise exempted from taxation under Section 501(c)(7) of the Code.[15] The same legislative process must be followed here; the IRS has no power to substitute its judgment for that of Congress.

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[14] Internal Security Act of 1950, ch. 1024, tit. I, § 11, 64 Stat. 996, *codified at* 50 U.S.C. § 790(b). The pertinent provision currently provides:

> No organization shall be entitled to exemption from Federal income tax, under section 501 of Title 26, for any taxable year if at any time during such taxable year there is in effect a final order of the Board determining such organization to be a Communist-action, Communist-front, or Communist-infiltrated organization.

[15] In the Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697, Congress denied tax-exempt status to an organization described in Section 501(c)(7) if its "charter, bylaws or other governing instrument or any written policy statement" provides for racially discriminatory policies. The amendment does not condition the granting of tax-exempt status under Section 501(c)(7) upon an organization ceasing any racially discriminatory policies. A footnote in the Senate Report indicates an awareness of the IRS policy involved in this case. S. Rep. No. 94-1318, 94th Cong., 2d Sess. 8 n. 5 (1976), *reprinted in* [1976] U.S. Cong. & Ad. News 6051, 6058. This Report was issued after the years involved in this case. Moreover, any inference of congressional approval of the IRS's actions is dubious in light of the Ashbrook Amendment. Indeed, the opposite inference arguably is to be drawn from the failure of Congress to enact a similar provision with respect to Section 501(c)(3) organizations.

Furthermore, if the IRS has the power to deny tax-exempt status to private schools which maintain racially discriminatory policies on the grounds that the schools' discriminatory policies violate federal public policy, it would appear that the IRS also has the power to deny tax-exempt status to any organization, educational or otherwise, that violates some public policy sought to be enforced by the IRS. As Professor Boris I. Bittker has noted, "[n]othing in the public policy standard . . . confines it to racial discrimination." 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 100.1.2, at 100-8 (1981). *See* Neuberger & Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration,* 48 Fordham L. Rev. 229, 272-73 (1979).

The federal public policy against employment discrimination codified in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides an example of the potentially far-reaching consequences of the Fourth Circuit's decision in this case. If the IRS were to determine that a school, or any other type of organization described in Section 501(c)(3) of the Code, had violated some provision of Title VII (even though the organization may have otherwise maintained racially nondiscriminatory policies), does the IRS have the power to deny the organization tax-exempt status because the organization violated federal public policy with respect to employment discrimination?

The possibility that such a scenario may, in fact, come to pass is very real. The IRS has already been pressured by the United States Commission on Civil Rights to "specifically prohibit racial, ethnic and sex discrimination in the treatment and selection of faculty." *Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 298 (1979) (statement of William B. Ball) (quoting Letter from Jeffrey M. Miller, Assistant Staff Director for Federal Evaluation of the United States Com-

mission on Civil Rights (March 20, 1978)) (emphasis deleted) [hereinafter cited as *Hearings*].

There is absolutely no evidence in the legislative history of Section 501(c)(3) that Congress intended to permit the IRS to be the arbiters of public policy in this country or that Congress intended to permit the IRS to selectively use the taxing power granted to Congress to enforce those public policies which the IRS, based on its own value judgment, has determined to be worthy of enforcement. Moreover, federal public policy is constantly changing and the determination of public policy at any point in time always requires the exercise of subjective judgments. Consequently, if the IRS is permitted to deny tax-exempt status to an organization on the ground that it has not complied with federal public policy, the ultimate result would be that the specific criteria for determining an organization's tax-exempt status under Section 501(c)(3) would change every time the IRS determines that there has been a change in federal public policy. Thus, subjective and arbitrary judgments by IRS bureaucrats would be substituted for objective standards enacted by Congress. If this Court now sanctions the IRS's refusal to grant tax-exempt status to those private schools that have racially discriminatory policies, the Court may someday look back with remorse on the day it first allowed the IRS to determine federal public policy.

II.

THE IRS'S CONSTRUCTION OF SECTION 501(c)(3) VIOLATES GOLDSBORO'S RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Last term this Court construed a provision of the Federal Unemployment Tax Act to exempt certain religious schools from mandatory state coverage under the Act in order "to avoid raising doubts of its constitutionality." *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. at ——, 101 S.Ct. at 2147. Difficult and sensitive

First Amendment questions are again before the Court in this case. If this Court determines that the IRS has the authority under Section 501(c)(3) to deny tax-exempt status to a school that maintains a racially discriminatory admissions policy, then it must determine whether such a denial violates the First Amendment rights of a pervasively religious school that discriminates because of its firmly held religious conviction that separtion of the races is scripturally mandated. *Cf. Lemon* v. *Kurtzman*, 403 U.S. 602, 657 (1971) (Brennan, J., concurring in part) ("the secular education [parochial] schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence").

The Constitution's mandates regarding religion are stated in the opening clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." In this case, the IRS's construction of Section 501(c)(3) contravenes the second of these mandates—the Free Exercise Clause.

Recognizing religious liberty to be a "preferred" freedom, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943), and the free exercise of religion to be a "transcendent value," *Norwood* v. *Harrison*, 413 U.S. 455, 469 (1973), this Court has held that the right to religious freedom should be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972). In this case, the IRS has attempted to reject any contention that its policy impinges on First Amendment rights. It relies on early Free Exercise Clause decisions in which this Court declared that only religious beliefs, not religiously-motivated actions, were constitutionally protected. *See, e.g., Mormon Church* v. *United States*, 136 U.S. 1 (1890); *Reynolds* v. *United States*, 98 U.S. 145 (1879). Reliance on these decisions is unfounded, however, because this Court has

long since rejected the simplistic belief/action dichotomy and recognized that the First Amendment guarantees both the freedom to believe and the freedom to act, with the caveat that the latter is not absolute. *See, e.g., Murdock* v. *Pennsylvania,* 319 U.S. at 109; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-04 (1940).

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), this Court was required, as it may be here, to perform a delicate balancing of interests; this Court held that, when an ostensibly neutral governmental policy restricts a person's right to act in accordance with his or her religious beliefs, "'[o]nly the gravest abuses, endangering paramount interests, give occassion for permissible limitation.'" *Id.* at 406 (quoting *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945)). The Court continued that, when such a conflict arose, it "would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation" would achieve the compelling government interest. *Id.* at 407. This Court reaffirmed *Sherbert* in *Wisconsin* v. *Yoder,* 406 U.S. at 215, when it held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Accord, Thomas* v. *Review Board,* 450 U.S. 707, ——, 101 S.Ct. 1425, 1432 (1981).

Under the "balancing approach" formulated by this Court in *Sherbert* and *Yoder,* a court confronted with a claim for a religion-based exemption from a government regulation must first determine whether the claim is in fact, based upon a sincerely held religious belief. Then, it must consider the degree to which the challenged regulation interferes with the religious practice or belief in light of the centrality of the practice or belief to the religion. The court must then weigh, on the other side of the balance, the importance of the secular value underlying the rule, the impact of an exemption on the regulatory scheme and the availability of a less restrictive alternative. *See* Note, ***Religious Exemptions Under the Free Exercise Clause: A***

Model of Competing Authorities, 90 Yale L. J. 350, 355 (1980); Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 Notre Dame Law, 925, 945 n. 125 (1979) [hereinafter cited as *IRS Treatment*]. When this balancing approach is followed in the present case, the scales tip heavily in favor of religious freedom and the creation of an exemption for religious schools, such as Goldsboro, that maintain discriminatory practices based on their sincere religious beliefs.

A. Goldsboro's Discriminatory Admissions Policy Is Based On A Sincere Religious Belief.

With regard to the sincerity of Goldsboro's religious belief mandating its racially discriminatory admissions policy, neither the IRS nor the Fourth Circuit disputes the district court's statement that Goldsboro's "policy is based upon a valid religious belief." (Pet. 7a).

In determining whether a belief or practice is "religious," it is important to note that "resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Board*, 450 U.S. at ——, 101 S.Ct. at 1430. Thus, although Goldsboro's racially discriminatory admissions policy may be reprehensible to many, it is nevertheless protected by the First Amendment since it is based on a genuine religious belief. *See United States* v. *Ballard*, 322 U.S. 78, 87 (1944).

B. The IRS's Policy Imposes A Heavy Burden On Goldsboro's Observance Of Its Relgious Beliefs.

The Court must next weigh the severity of the burden imposed on Goldsboro's religious practices by permitting the IRS to deny Goldsboro tax-exempt status. Although the

coercive effect of denying tax-exempt status to Goldsboro is indirect, it is nonetheless substantial. In *Thomas* v. *Review Board*, 450 U.S. at ——, 101 S.Ct. at 1432, this Court recently stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

See Everson v. *Board of Education*, 330 U.S. 1, 16 (1947).

Moreover, this Court has recognized that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania*, 319 U.S. at 112. In this case, Goldsboro has been given the option of adopting a policy that is diametrically opposed to its firmly held religious convictions and publicly advertising that fact, *see* Rev. Proc. 75-50, 1975-2 C.B. 587, § 4.03, or of continuing to follow what it believes to be God's will as revealed in the Holy Scriptures and annually incurring substantial tax liabilities which would threaten its continued existence.

Moreover, like the traditional way of life of the Amish considered by this Court in *Yoder*, Goldsboro's discriminatory policy is "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Wisconsin* v. *Yoder*, 406 U.S. at 216. Goldsboro sincerely believes that its educational mission must be conducted in a segregated setting because the Scriptures reveal that God has mandated the separation of the races and that the intermixing of the races "destroys the fear of God in the hearts of men and will bring about the judgment of the entire human race." (J.A. 40). Thus, a central and funda-

mental tenet of Goldsboro's religious beliefs—the salvation of mankind—is burdened by the IRS's denial of its tax-exempt status.

In addition to the reversal of Goldsboro's admissions policy, compliance with the rulings and procedures promulgated by the IRS would require that Goldsboro cease the teaching of its religious belief in the separation of the races. This Court has recognized that the government may not unreasonably interfere with "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-35 (1925), including the right under the First Amendment to send their children to educational institutions that "promote the belief that racial segregation is desirable." *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976). As a practical matter, however, it would be impossible for Goldsboro's teachers to continue to promote separation of the races in the presence of the students who favor integration (which Goldsboro's compliance with Revenue Procedure 75-50 would most assuredly attract) without inciting outbursts and disruptions that would be detrimental to the educational process.

Finally, while the immediate burden imposed on the free exercise of religion by the IRS's policy is onerous, the prospect for the future is even more frightening. Considerable pressure is being put on the IRS to extend its public policy rationale to deny tax-exempt status to those private schools that practice gender-based discrimination. *See* Part I.C. *supra*. Such an extension would effectively deny tax-exempt status to schools operated by a number of religions, including the Catholics, Mormons and Moravians, that differentiate between the roles of men and women. In addition, Professor Bernard Wolfman has indicated that there is even pressure on the IRS to eliminate religious discrimination in private schools. *Hearings*, *supra*, at 275. Therefore, it is not surprising that the religious commu-

nity has, in response to the IRS's actions, adopted Madison's admonition that "it is proper to take alarm at the first experiment on our liberties." J. Madison, *Memorial and Remonstrance Against Religious Assessments,* in 2 *Writings of J. Madison* 183, 185 (G. Hunt ed. 1901).

C. The Secular Value Underlying The IRS's Policy Differs In Both Kind And Degree From Those That This Court Has Held To Outweigh The Free Exercise Of Religion.

Turning to the other side of the balance, the first factor that this Court should weigh is the importance of the secular value underlying the IRS's policy. The IRS has taken the position that "[i]t is well-settled that a religious basis for an activity will not serve to preclude governmental interference with that activity if it is otherwise clearly contrary to Federal public policy." Rev. Rul. 75-231, 1975-1 C.B. 158. This ambitious statement, however, is at odds with this Court's pronouncements on the subject. Indeed, this Court concluded that on balance the State's interest in universal education under consideration in *Yoder* impinged too greatly upon and was outweighed by the right of the Amish to the free exercise of religion even though it ranked the provision of public schools "at the very apex of the function of a State." *Wisconsin* v. *Yoder,* 406 U.S. at 213. Moreover, at least one court has noted that, to the extent there can be any absolute hierarchy of constitutional values, "the rights protected by the First Amendment occupy a preferred position in our Constitutional scheme." *Kosydar* v. *Wolman,* 353 F.Supp. 744, 756 n. 11 (S.D. Ohio 1972) (three-judge court), *aff'd per curiam sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1973).

The effort of the IRS to stamp out the last vestiges of racial discrimination by conditioning the granting of tax-exempt status to a private school on its compliance with racially nondiscriminatory policies would certainly be hailed

by many people. The public policy underlying this effort, however, differs in both kind and degree from those governmental interests that this Court has found to "overbalance" the free exercise of religion in prior decisions.

This Court has stated that governmental regulations which outweigh religious freedom have "invariably [involved] some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U.S. at 403. A survey of the cases in which this Court has permitted some infringement of religious liberty reveals that the government regulations upheld were either criminal statutes designed to protect the public welfare, *see, e.g., Reynolds* v. *United States*, 98 U.S. 145 (1879) (prohibiting polygamy), statutes protecting public health or promoting safety, *see, e.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (child labor law), or regulations that had an incidental effect on, and therefore did not unconstitutionally burden, the practice of religion, *see, e.g., Braunfeld* v. *Brown*, 366 U.S. 599 (1961) (Sunday closing law). The "public policy" against racial discrimination that is the subject of this case falls into none of these categories.

The position of the IRS at issue in this case also differs in degree from the government regulations that have been upheld by this Court in the face of First Amendment challenges in that the policy against racially discriminatory admissions practices based on the sincere religious beliefs of sectarian schools has not been mandated by either Congress or the courts but rather has been independently formulated by the IRS itself. Although this Court stated in *Bob Jones University* v. *Simon*, 416 U.S. at 750, that it considered Congress to be "the appropriate body to weigh the relevant policy-laden considerations" involved in how tax-exempt organizations should be treated, there is no explicit congressional authorization to justify the IRS's policy of denying tax-exempt status to religious schools that do not admit blacks. Further, any contention

by the IRS of implicit authorization has now been seriously undercut, if not totally rebutted, by Congress' passage of the Ashbrook Amendment. *See* Part I.C. *supra.*

Neither can the IRS find support for its policy in the decisions of this Court.[16] The IRS attempts to rely on this Court's decision in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), that 42 U.S.C. § 1981 prohibits racial discrimination in private schools. The *Runyon* Court was careful to point out, however, that the case before it did not present a question of "the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds." *Id.* at 167 (emphasis deleted).

Thus, the IRS stands alone as the propounder of its "public policy" against racial discrimination by a sectarian school practiced in observance of a fundamental tenet of its religion. This Court has remarked on the dangers inherent in premising a decision on "public policy":

> The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

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[16] Nor is the IRS's policy supported by the decisions of the lower federal courts. As previously discussed, the *Green* litigation did not consider religious schools that maintained racially discriminatory policies based on their religious beliefs. *See* footnote 3 *supra.* Moreover, the two courts which have applied Section 1981 to private sectarian schools have based their decisions on the fact that the schools' racially discriminatory actions were *not* based on the schools' religious beliefs. *Fiedler* v. *Marumsco Christian Schools*, 631 F.2d 1144 (4th Cir. 1980); *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977) (*en banc*), *cert. denied*, 434 U.S. 1063 (1978).

Patton v. *United States*, 281 U.S. 276, 306 (1930). Moreover, this Court has refused to permit administrative regulation in the highly sensitive arena of church-operated schools in the "absence of an 'affirmative intention of the Congress clearly expressed.'" *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 506.

Indeed, IRS Commissioner Kurtz has himself expressed a concern that "questions of religion and civil rights . . . are far afield from the more typical tasks of tax administrators—determining taxable income." Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 Cath. Law. 301, 301 (1978). In addition, Mr. Kurtz has suggested that "the basic purpose of the tax system is to raise revenue in a way which is consistent with general economic growth and prosperity—rather than assuming that it is a system designed to cure social problems." Kurtz, *Tax Incentives: Their Use and Misuse*, 20 U.S.C. Law Center Tax Institute 1, 16 (1968). The Commissioner's concern about the ability of tax administrators, whose expertise is financial, to balance sensitive considerations of religion and civil rights has been shared by others of eminent qualification. *See* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L. J. 51, 86 (1972); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 Harv. L. Rev. 705, 729 (1970).

These doubts appear to be well founded given the IRS's cavalier treatment of the free exercise question raised by the denial of tax-exempt status to sectarian schools. *See* Rev. Rul. 75-231, 1975-1 C.B. 158. The attempt by the IRS to skirt the issue by relying on the now discredited belief/action dichotomy of *Reynolds* has been charitably described as "unrealistic," Neuberger & Crumplar, *supra*, at 268, and more accurately labeled "a totally erroneous statement of law." *IRS Treatment*, *supra*, at 943. Thus, this

Court's careful approach to decisions involving sectarian schools "stands in sharp contrast to the IRS's treatment of the free exercise claim in Revenue Ruling 75-231." *Id.* at 944. Further, that ruling implements a "public policy" that can only be regarded as far different in both kind and degree from the secular values that this Court has found to "overbalance" religious liberty.

D. The Creation Of A Religious Exemption Would Have Only A Minor Effect On The IRS's Goal Of Eradicating Discrimination.

This Court must, of course, consider the impact that a religious exemption from the IRS's policy announced in its July 10, 1970 press release would have on its goal of eradicating discrimination in education. That impact, however, can only be described as minor in the present case. In 1976, less than nine percent of the approximately 50 million children enrolled in elementary and secondary schools in America attended church-related private schools. *See* Note, *The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?* 56 Notre Dame Law. 141, 141 (1980). Moreover, any exemption from the IRS's policy required out of deference to the free exercise of religion could only be claimed by those sectarian schools that base their racially discriminatory policies on sincerely held religious beliefs. Therefore, the IRS's policy would continue to be applicable to all but the smallest fraction of schools in the United States.

Moreover, the IRS's assertion that the extension of tax-exempt status to racially discriminatory private schools results in constitutionally prohibited state involvement in discrimination is simply not supported by the decisions of this Court. This Court's decision in *Norwood* v. *Harrison*, 413 U.S. at 466, that the government may not extend financial support to discriminatory schools was limited to "tangible financial aid" that has "a significant tendency to facilitate, reinforce, and support private discrimination."

This term does not encompass the granting of tax-exempt status to religious schools because tax exemptions "constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Walz* v. *Tax Commission*, 357 U.S. 664, 691 (1970) (Brennan, J., concurring). In addition, this Court has stated that the relevant inquiry in deciding a "state action" question is whether there has been *significant* state involvement in the private discrimination alleged. *See Gilmore* v. *City of Montgomery*, 417 U.S. 556, 574 (1974). Thus, the IRS's policy of denying tax-exempt status to private religious schools that practice racial discrimination is not constitutionally compelled, *see IRS Treatment, supra*, at 934-35, and an exemption for religious schools from that policy accordingly does not violate the Constitution.

E. An Action Under 42 U.S.C. § 1981 Provides A Less Restrictive Means By Which Racial Discrimination May Be Attacked.

The IRS cannot burden First Amendment freedoms unless it can show its policy "is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Board*, 450 US. at ——, 101 S.Ct. at 1431. A less restrictive, and indeed more direct, means of challenging the right of religious schools to discriminate on the basis of race lies in a cause of action under 42 U.S.C. § 1981. Although no court has applied this statute to prohibit racial discrimination based on the religious beliefs of a sectarian school, neither has any court foreclosed that avenue.

An action under Section 1981 would provide a less restrictive vehicle for addressing the issue of racial discrimination in religious schools by focusing on those sectarian schools that have, in fact, rejected the application for admission of a minority student as opposed to those schools that have discriminatory policies but have never been forced to implement them. Goldsboro clearly falls into the

latter category; there is no evidence in this case that Goldsboro has ever been forced to utilize its racially discriminatory admissions policy in response to the application for admission of a black student. The position of the IRS, on the other hand, that tax-exempt status must be denied to all schools that maintain racially discriminatory policies requires religious schools, such as Goldsboro, to follow a course of action that is diametrically opposed to their sincerely held religious beliefs in order to preserve their tax-exempt status. This needless restriction on religious freedom could be avoided if the IRS left the eradication of racial discrimination to private enforcement under Section 1981.

Moreover, in an action under Section 1981, the interest of a sectarian school in religious freedom on one side and the interest of the minority applicant in being free from discrimination on the other side would be clearly and directly presented to a court for resolution. *See* Neuberger & Crumplar, *supra*, at 273-75; *IRS Treatment*, *supra*, at 947-49. Such a context is certainly preferable to the present one, in which sensitive policy decisions have been made by an administrative agency which has no expertise in this area and is instead responsible only for the collection of taxes. Therefore, the IRS's policy should not be applied to religious schools that discriminate out of obedience to a sincerely held religious belief because there is a less restrictive alternative that could be utilized to test the respective interests that underlie the policy.

F. Goldsboro's Religious Freedom Overbalances The Government's Interests In This Case.

Based on the factors that this Court has traditionally balanced in ruling on free exercise claims, this Court should hold that the Free Exercise Clause of the First Amendment prohibits the IRS from denying tax-exempt status to religious schools that maintain racially discriminatory policies based on their sincere religious beliefs. The Government acknowledges that Goldsboro's discriminatory

admissions policy is based on a sincerely held religious belief, and the district court stated that Goldsboro's "racially discriminatory admissions policy is based upon a valid religious belief." (Pet. 7a). The application of the IRS's policy to Golsboro, on the other hand, would severely burden the free exercise of that belief.

On the other side of the balance, the secular value underlying the IRS policy sought to be enforced in this case differs in both kind and degree from those regulations which this Court has found in the past to outweigh religious liberty. Further, the creation of a religious exemption to the IRS policy would not have a significant impact on the goal of eradicating racial discrimination. Finally, a cause of action under Section 1981 provides a less restrictive alternative for attacking racial discrimination. The scales tip heavily in favor of Goldsboro in this case. Accordingly, Goldsboro must be exempted from the IRS policy.

CONCLUSION

For the foregoing reasons the judgment of the Fourth Circuit should be reversed; this case should be remanded to the Fourth Circuit with directions to remand it to the district court for the entry of summary judgment in favor of Goldsboro on the issue of its qualification as a tax-exempt educational organization under Section 501(c)(3).

Respectfully submitted,

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Supplemental Brief

1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RECEIVED
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SUPREME COURT, U.S.

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 81-3

BOB JONES UNIVERSITY

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

GOLDSBORO CHRISTIAN SCHOOLS' MOTION FOR DIVIDED ARGUMENT AND ADDITIONAL TIME

Pursuant to Rules 38.3 and 38.4 of the Rules of this Court, petitioner Goldsboro Christian Schools, Inc., No. 81-1, moves that an additional 15 minutes be allotted to the petitioners for oral argument in these consolidated cases and that the time allotted to the petitioners for oral argument be divided 30 minutes

to Bob Jones University ("Bob Jones") and 15 minutes to Goldsboro Christian Schools, Inc. ("Goldsboro").

Although this Court has chosen to consolidate these cases for purposes of oral argument, there are several significant differences between the two cases that militate in favor of divided argument by the petitioners and the award of additional time for the petitioners to fully explicate their respective arguments. At the outset, it should be noted that there are three salient differences in the factual contexts out of which these cases have arisen.

First, in Goldsboro, the Internal Revenue Service ("Service") seeks to deny tax-exempt status to Goldsboro and collect taxes from it for the period from November 30, 1970 to December 31, 1972; on the other hand, the tax years from 1971 through 1975 are involved in Bob Jones. This difference in years is important because the Service promulgated both a revenue ruling and a revenue procedure on the issues in these cases after the years involved in Goldsboro but during the years involved in Bob Jones.

Second, the Service denied tax-exempt status to Goldsboro because it maintained a racially discriminatory admissions policy based on its belief that intermixing of the races is prohibited by the Holy Scriptures; Goldsboro's policy has been consistent throughout its existence. On the other hand, Bob Jones' racially discriminatory policies, for which its tax-exempt status was revoked by the Service, have been modified during the years at issue. Initially, Bob Jones, like Goldsboro, had a racially discriminatory admissions policy; then Bob Jones began to admit blacks but instituted disciplinary policies that prohibited interracial dating and marriage. This factual distinction has significance with respect to the First Amendment issues raised in the respective cases.

Third, these two cases were first consolidated by this Court. The cases were filed in different district courts and are

in different procedural postures. In Goldsboro, the United States District Court for the Eastern District of North Carolina granted summary judgment in favor of the government on the issue of Goldsboro's tax-exempt status. In Bob Jones, the United States District Court for the District of South Carolina entered judgment in favor of Bob Jones following a nonjury trial. One panel of the Fourth Circuit reversed the judgment of the district court in Bob Jones; an entirely separate panel affirmed the judgment of the district court in Goldsboro. Therefore, there are two separate judgments based on two separate records before this Court in these consolidated cases.

In addition, counsel for Goldsboro, who have served in that capacity in both the trial and appellate courts below, and counsel for Bob Jones, who entered the case on petition for certiorari to this Court, have, in some respects, taken divergent approaches to the common legal issues that have been raised. Goldsboro has asserted the single constitutional issue of whether denial of tax-exempt status to Goldsboro constitutes a violation of its right to the free exercise of religion. Bob Jones, in contrast, has posited arguments under both the Free Exercise and Establishment Clauses of the First Amendment, as well as the Due Process Clause of the Fifth Amendment.

Similarly, while both petitioners have challenged the Service's construction of Section 501(c)(3) of the Internal Revenue Code, their respective approaches to this issue have differed. Goldsboro has raised several points with respect to the issue of statutory construction that have not been treated by Bob Jones. By contrast, Bob Jones has placed emphasis on the constitutional issues that it has raised and therefore presented a more circumscribed argument with respect to the statutory construction issue.

Given the significant distinctions, both factually and legally, between these consolidated cases, divided argument is

certainly warranted. Moreover, an additional 15 minutes, would enable each of the petitioners to adequately present its position to the Court. Therefore, the granting of Goldsboro's motion would serve to significantly aid this Court in its understanding and resolution of the important and far-reaching issues raised in these consolidated cases.

In the event the Court enlarges petitioner's time for argument, Goldsboro Christian Schools, Inc., of course, has no objection to similar treatment of respondent.

In the event the Court grants Goldsboro's motion for divided argument but denies its motion for additional time for oral argument, Goldsboro requests that 20 minutes be allotted to Bob Jones and 10 minutes be allotted to Goldsboro.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William G. McNairy, one of the attorneys for Goldsboro Christian Schools, Inc., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served Goldsboro Christian Schools' Motion for Divided Argument and Additional Time by depositing one copy thereof in the United States mail, with first-class postage prepaid, addressed to the following persons:

Lawrence G. Wallace, Esquire
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William Bentley Ball, Esquire
Ball & Skelly
511 North Second Street
Post Office Box 1108
Harrisburg, Pennsylvania 17108

This the 3rd day of December, 1981.

WILLIAM G. McNAIRY
Attorney for Petitioner
Goldsboro Christian Schools, Inc.

Supplemental Brief 2

Office-Supreme Court, U.S.
FILED
FEB 24 1982
ALEXANDER L. STEVAS,
CLERK

FEB 26 PAGE 14

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER GOLDSBORO CHRISTIAN SCHOOLS, INC.

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Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER,
GOLDSBORO CHRISTIAN SCHOOLS, INC.

Petitioner, Goldsboro Christian Schools, Inc., ("Goldsboro") wishes to update the Court on events occurring subsequent to the filing of its Memorandum of January 14, 1982.

On January 8, 1982, the Acting Solicitor General filed a Memorandum for the United States in which he represented

that the "Department of the Treasury has initiated the necessary steps to grant petitioner, Goldsboro Christian Schools, tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute." (Memorandum, 2). This position was also announced by the Treasury Department in a News Release issued the same day.

Relying on the representations of the Acting Solicitor General to this Court, Goldsboro filed a Memorandum on January 14, 1982, which stated that because the Treasury Department had granted Goldsboro all the relief requested, no case or controversy existed between the parties. Thus, Goldsboro joined the United States in urging the Court to vacate the judgment of the United States Court of Appeals for the Fourth Circuit and further suggested to the Court that the Fourth Circuit be instructed to remand the case to the United States District Court for the Eastern District of North Carolina for entry of dismissal of the judgment against Goldsboro as to the issue now pending before this Court.

Forty-five days have now elapsed since the United States filed its Memorandum. The Department of the Treasury has not yet granted Goldsboro tax-exempt status under Section 501(c)(3) of the Internal Revenue Code nor refunded to it the taxes in dispute. Moreover, on February 18, 1982, the United States Court of Appeals for the District of Columbia Circuit in Wright v. Regan, No. 80-1124, entered the following injunction:

> "[T]he Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status . . . to any school that unlawfully discriminates on the basis of race. . ."

A copy of the Order of the Court of Appeals forwarded to counsel for Goldsboro by the Acting Solicitor General is attached.

The Acting Solicitor General has informed counsel for Goldsboro that the United States interprets this injunction to prohibit the Treasury Department from granting tax-exempt status to Goldsboro as promised in the Memorandum of the United States filed with the Court on January 8, 1982.

Thus, a case or controversy of national importance continues to exist between the parties for the reasons stated in Goldsboro's Petition for a Writ of Certiorari and the supporting Brief for the United States.

Goldsboro requests that the Court enter an appropriate Order permitting the Secretary of the Treasury and the Commissioner for the Internal Revenue Service to grant Goldsboro the relief promised in the Memorandum filed by the Acting Solicitor General on January 8, 1982. Goldsboro further requests that the Court take no further action in this case until the relief promised Goldsboro has been granted. After the United States has taken the promised action, Goldsboro requests that the portion of the judgment of the Fourth Circuit that relates to the issue now pending before the Court be vacated and the case remanded to the Fourth Circuit with instructions to that court to remand the case to the District Court for entry of an appropriate judgment.

In the event the Secretary of the Treasury is not permitted to grant Goldsboro the relief promised in the Memorandum of the United States filed on January 8, 1982, Goldsboro requests that this case be set down for oral argument on the merits. In addition, Goldsboro requests that the Court reconsider its denial of Goldsboro's Motion for Divided Argument and Additional Time.

Respectfully submitted,

William G. McNairy

WILLIAM G. McNAIRY
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD
Counsel for Petitioner
Goldsboro Christian Schools, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 1982, a copy of the foregoing SUPPLEMENTAL MEMORANDUM FOR PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS, INC. was mailed, postage prepaid, to the following:

Lawrence G. Wallace
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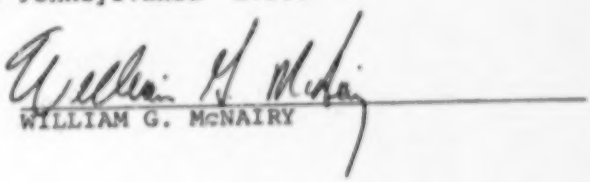

WILLIAM G. McNAIRY

Appendix

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1124 September Term, 19 81

Civil Action No. 76-1426

Inez Wright, individually and on behalf of her minor children, Oscar Clay Renfro, Anthony Lee Renfro, Lisa Marie Wright, and Ephron Antoni Wright, Jr., et al.,
Appellants

v.

Donald T. Regan, Secretary of the Treasury, et al.

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 18 1982

GEORGE A. FISHER
CLERK

No. 82-1134

Civil Action No. 69-01355

William H. Green, on his own behalf and on behalf of his minor children, et al.,
Appellants

v.

Donald T. Regan, as Secretary of the Treasury of the United States, et al.

BEFORE: Wright, Tamm and Ginsburg, Circuit Judges

O R D E R

On consideration of movants' request for an injunction pending appeal in No. 82-1134, for an injunction under the "All Writs Act" to preserve the status quo and protect the potential effectiveness of this court's decision in No. 80-1124, and for consolidation of Nos. 82-1134 and 80-1124, it is hereby

ORDERED that the application to consolidate Nos. 82-1134 and 80-1124 is denied; and it is further

ORDERED that the motion for an injunction pending appeal in No. 82-1134 be referred forthwith to the motions panel for expeditious consideration; and it is further

ORDERED that the motion for relief under the "All Writs Act" in No. 80-1124 be filed and that a response thereto by the Secretary of the Treasury and the Commissioner of Internal Revenue be filed within fifteen days of the date of this order; and it is further

ORDERED, that to preserve the status quo pending response to the motion in No. 80-1124 and, thereafter, the court's determination of its authority to consider and decide the issues presented, see United States v. United Mine Workers, 330 U.S. 258 (1947), the Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, see Runyon v. McCrary, 427 U.S. 160 (1976), by failing to maintain a "racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment in Green v. Connally, 330 F.Supp. 1150, 1179 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

Per Curiam

Supplemental Brief

3

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Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION OF PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS, FOR SUMMARY REVERSAL

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Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION OF
PETITIONER, GOLDSBORO CHRISTIAN SCHOOLS,
FOR SUMMARY REVERSAL

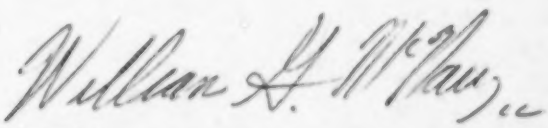
In the Motion and Brief for the United States filed on February 25, 1982, the United States confessed error on the statutory construction issue pending before this Court in these consolidated cases, stating:

> . . . Section 501(c)(3) does not permit the Commissioner of Internal Revenue to withhold congressionally authorized tax exemptions from otherwise qualified "religious" and "educational" organizations based solely on an administrative determination of failure to conform to the national policy. [Brief for the United States, typewritten manuscript, page 13]
>
> * * *
>
> [The Fourth Circuit's] construction of Section 501(c)(3) is at odds with the statute's language, its legislative history, and other objective evidence of legislative intent, and it should not be accepted by this Court. [Brief for the United States, typewritten manuscript, page 14]

Because of this confession of error by the United States, it is unnecessary for this Court to reach the First Amendment issues raised in the Petitions and Briefs in these consolidated cases.

For the reasons more fully stated in the Motion of Petitioner, Bob Jones University, filed on March 3, 1982, Petitioner Goldsboro Christian Schools, Inc. moves the Court to summarily reverse the Judgment of the United States Court of Appeals for the Fourth Circuit on the issues now pending before this Court with instructions to that court to remand the case to the United States District Court for the Eastern District of North Carolina for an appropriate judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 1982, a copy of the foregoing was mailed, postage prepaid to the following: Lawrence G. Wallace, Acting Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530 and William Bentley Ball, Ball & Skelly, 511 North Second Street, P.O. Box 1108, Harrisburg, Pennsylvania 17108.

William G. McNairy

Supplemental Brief

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SUPREME COURT, U.S.

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March 8, 1982

The Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D. C. 20543

Re: Goldsboro Christian Schools, Inc. v. United States, No. 81-1 and Bob Jones University v. United States, No. 81-3

Dear Mr. Stevas:

On March 4, 1982, you requested that the Acting Solicitor General furnish copies of the draft brief for the United States referred to in the footnote on Page (I) of the Brief for the United States filed in the above cases on March 3, 1982. Pursuant to your request, Lawrence A. Wallace lodged copies of the draft brief with the Court that same day.

Since the draft brief has now been lodged with the Court, I am enclosing fifteen copies of the following:

1. Statement of Edward C. Schmults, Deputy Attorney General, Before the Senate Finance Committee, United States Senate, February 1, 1982.

2. Statement of the Honorable R. T. McNamar, Deputy Secretary of the Treasury, Before the Senate Finance Committee, United States Senate, February 1, 1982.

These statements by Mr. Schmults and Mr. McNamar describe the objective and comprehensive legal analysis undertaken by the Justice Department and the Treasury Department that lead to the rejection of the legal arguments contained in the draft brief lodged with the Court by Mr. Wallace on March 4, 1982.

Identical statements were made by both Mr. Schmults and Mr. McNamar before the Committee on Ways and Means of the U.S. House of Representatives on February 4, 1982.

I would appreciate your lodging copies of this letter and the enclosed statements of Mr. Schmults and Mr. McNamar with the Court.

Very truly yours,

William G. McNairy
Counsel of Record for
Petitioner, Goldsboro
Christian Schools, Inc.

WGM/bkw

Enclosures

cc: Mr. Lawrence A. Wallace
Mr. William B. Ball

For Release Upon Delivery

Expected 10:30 a.m. EST

STATEMENT OF
THE HONORABLE R.T. MCNAMAR
DEPUTY SECRETARY OF THE TREASURY
BEFORE THE SENATE FINANCE COMMITTEE
FEBRUARY 1, 1982

Mr. Chairman and Members of the Committee:

With me from the Treasury Department is our General Counsel, Peter J. Wallison.

We are pleased to appear before the Committee to present the views of the Treasury on the Administration's bill. This bill would deny the benefits of tax exempt status to organizations maintaining private schools that follow racially discriminatory practices.

Indeed, in light of the controversy that has developed in this area in recent weeks, we are especially pleased to have an opportunity to dispel some of the confusion and misconceptions regarding the policy of this Administration both with respect to racially discriminatory schools and the appropriate role of the Internal Revenue Service.

At the outset, we wish to emphasize the following points:

The Reagan Administration is unalterably opposed to racial discrimination in any form. Further, the Administration endorses, in the strongest fashion, the principles of Brown v. Board of Education, that racial discrimination in education has no place in a free society and should not in any way be tolerated or encouraged by the Government.

Thus, the Administration believes that racially discriminatory schools, and the organizations that maintain them, should not be recipients of tax deductible contributions. However, we recognize that protection must be accorded to the legitimate exercise of religious beliefs.

While the Administration believes that the benefits of tax exemption should be denied to racially discriminatory schools, it also believes that such a position must be based on statute. However popular it would have been to come out the other way, we and the Justice Department are unable to find that Congress has yet authorized such action in the Internal Revenue Code.

It is not satisfactory to say that the tax laws permit the Internal Revenue Service to require that tax exempt organizations must comply with certain fundamental public policies. If we follow this approach, at any time the Service may go beyond

racial discrimination and decide that some other policy -- such as discrimination based on sex -- requires the revocation of tax exemptions for schools which admit only women. Instead, we believe that Congress should authorize the denial of tax exemption based only on racial discrimination by passing a law to this effect. That is why the Administration has submitted the bill that is before this Committee today.

Against this background, I would like to discuss in some detail three specific areas that are of appropriate interest to the Congress and the American public. They are:

1. The chronology of events in reaching the joint Treasury and Justice decision not to file a brief in support of the position of the Internal Revenue Service before the Supreme Court.

2. The rationale for this decision.

3. A discussion of the Administration's legislation.

CHRONOLOGY OF EVENTS

Although it is unusual for any agency to recount in detail the events which led to a particular legal or policy decision, Congress has indicated a desire to inquire into this matter and there have been allegations that the decision was the result of a political choice. On the contrary, as the chronology of events will show, the decision was the result of a careful, thorough legal analysis, and was made despite a recognition of the politically unpopular nature of that decision. In fact, the events show that the Treasury and Justice Departments hoped to be persuaded that the Service's policy of administratively denying tax exemptions to schools that racially discriminate was supportable.

The decision announced on January 8 was not an easy one and in my view presented an issue that should have been confronted in 1970 when the Service, at the request of the Nixon White House, adopted a position which was then being advanced by the plaintiffs in the first Green case. In that case, plaintiffs argued that the Service was authorized to deny tax exemptions to racially discriminatory schools because all tax exempt entities had to be "charitable" in the common law sense amd as such had to pursue certain fundamental public policies. One of these fundamental public policies was non-discrimination on the grounds of race.

In adopting the position of the plaintiffs in Green v. Connally, the Service achieved a satisfactory outcome in that particular case; it could deny tax exemptions to racially

discriminatory schools. But there was a broader issue involved, which was not adequately considered at the time. If the Service could require tax exempt schools to follow a policy of racial non-discrimination, could it also impose other policies on the ground that they too were Federal public policies? In other words, did this legal principle establish a basis for IRS actions which went well beyond the laudable objective of prohibiting racial discrimination?

After eleven years, when it came time for a subsequent Administration to file a brief in the Supreme Court endorsing the legal theory adopted by the Service in 1970, that issue had to be faced squarely. In December 1981, as the time for filing a Supreme Court brief approached, the question could no longer be avoided, and after extensive review of the law the Treasury and Justice Departments were compelled to conclude the theory adopted by the Service in 1970 could not be rationalized under existing statutes on either a legal or a policy basis, because it would confer on the Service a breadth of discretion that no administrative agency should have.

The decision to grant Bob Jones University its tax exemption was made as a matter of policy and law, and involved politics only in its broadest and best sense -- the mandate of the Reagan Administration to assure that the Government of the United States acts responsibly and in accordance with the laws enacted by Congress. Let me summarize what the Chronology of Events shows and include all my contacts with the White House.

I first became aware that there was a concern over our legal position in the Bob Jones case when Deputy Attorney General Ed Schmults called me on the evening of December 8 and asked if I were aware of the Bob Jones case. I indicated I knew of its existence and that it involved tax exempt status for religious schools that practiced racial discrimination. He indicated that the Justice Department was reviewing the legal papers it was preparing for the Supreme Court on December 31. He asked that I look into the matter because it involved important policy issues and get back to him.

I subsequently informed Secretary Regan about the Justice Department's concerns in the Bob Jones case sometime during the week of December 14, at one of the frequent meetings we have during any given week. He did not suggest that I come to any particular conclusion. Rather, he indicated he wanted to be kept apprised over the Christmas vacation.

As we reviewed the legal basis for our position, the Treasury began to have concerns about the policy issues which were then under review in the Justice Department. However, in an effort to continue supporting the Service's position, we agreed to postpone any decision until we all had a chance to read the brief being prepared by the Solicitor General's office. About this time, I informed Fred Fielding, White House Counsel, of our growing concern about the case and the government's position. I later met with him in his office, on December 22, to explore the legal problems of the case, and indicated we were awaiting the Solicitor's brief supporting the Service.

Subsequently, on Monday, December 28, Secretary Regan informed me that Ed Meese wished to be apprised of the case. That afternoon I phoned Meese and told him that I was concerned about our position, that we had informed Fielding and that we all recognized the political sensitivity of taking a legal position that might be construed as contrary to the Administration's policy against racial discrimination. He pressed me to be sure that the Justice and Treasury Departments were absolutely comfortable with their position on the law before taking any action. I indicated that we were waiting for the final Justice Department draft brief supporting the IRS position before we made any decision.

On the evening of December 23, I read the initial Justice Department draft of the brief for the Supreme Court. The brief supported the IRS position that it had authority to deny the tax exemptions. I was unpersuaded by the logic or the legal citations. I then asked for a second draft brief narrowed to the issue of racial discrimination. However, the second draft, which I received on December 29, was still based on the theory that the Service could determine that certain Federal public policies could be used as a precondition for obtaining and retaining tax exempt status. Given two tries, there was apparently no legal theory that would permit the Service to deny tax exemptions on the basis of racial discrimination without also giving the authority to deny or revoke exemptions on other grounds.

I, therefore, concluded that the Treasury could no longer support the IRS on this matter, because the Government would be required to take a position in the Supreme Court that we simply did not regard as being either supported by statutory authority or adequately determined by the relevant case law and appropriate policy.

On December 30 the Deputy Attorney General, the Assistant Attorney General for Civil Rights and I met with Fred Fielding and others to tell Fielding of Treasury's preliminary decision. I talked to Secretary Regan in person on December 28 and by telephone on December 30. At no time during this process did either Fielding or Regan attempt to influence my judgment of the legal issues in the case or order me to reach any particular conclusion. I also had no contact with any Congressmen or Senators in making this decision.

In an effort to be certain that the Departments of Justice and Treasury were legally correct on a matter of such important national policy, we requested a one-week extension from the Supreme Court and reviewed the matter several times with the Commissioner and the Chief Counsel of IRS, the Treasury Department's Office of Tax Policy and with the Justice Department.

During this period, a number of the initial thoughts in our discussions were reduced to a draft memorandum by the Department of Justice -- the unsigned, undated copy of which has been furnished to this Committee -- and the final decision was made on January 8. This additional time permitted a thorough review of my decision by all the relevant senior officials in the Justice and Treasury Departments who might have a perspective on the case. By January 8 we were ready to announce our decision. Since we could not support the Service's position before the Supreme Court, there was no choice but to grant the tax exemptions which were the subject of the suit. I was out of Washington and by phone I directed the Commissioner of Internal Revenue to take the actions necessary to grant these exemptions. Since the case before the Supreme Court was now moot, the Justice Department filed a memorandum with the Supreme Court seeking to have the court vacate its jurisdiction.

RATIONALE FOR TREASURY DECISION

The decision announced on January 8, 1982, had its origins in a policy determination by the Nixon White House in 1970. That decision directed the Service to accede to the position of the plaintiffs in the first Green case in the Federal District Court. This reversed the long-standing IRS opposition to involving the administration of the tax laws in the controversy surrounding racial discrimination. Although this decision advanced a laudable goal, the 1970 decision was not soundly based on statutory law and the consequences of this expedient approach were finally recognized in late 1981 when the Treasury Department was required to approve the Justice Department brief which articulated the legal rationale adopted in 1970.

The Justice Department has prepared and delivered to the Treasury Department a memorandum of law which describes the legal deficiencies in the Service's position. As the Justice Department memorandum concludes, there is no adequate basis in law for the Service's position that it has the authority to select certain Federal public policies and impose these policies on tax exempt organizations. Nor is there a legal basis for concluding that the IRS has the statutory authority to invoke Section 501(c)(3) and the attendant denial of deductions under Section 170 to any school or university that violates the civil rights laws. The Justice Department memo makes clear that there is no statutory language or Congressional direction, no legislative history, and no definitive Supreme Court opinion, that authorizes or requires the IRS to revoke the tax exemptions of schools that do not comply with Federal public policy or otherwise violate the civil rights laws.

The Committee should note that there is no question that the Internal Revenue Service was under tremendous pressure to adopt the view it took in 1970, and has acted professionally and responsibly. However, the "public policies" rationale the Service adopted was a post hoc legal justification for a prior policy action.

In making the Treasury's policy decision we were faced with a classic moral dilemma. "Does the end justify the means?" That is, does the attainment of a good end or objective (eliminating discrimination) justify the endorsement of a theory that we regarded as unauthorized by law? This ethical dilemma has been long settled in all civilized societies. The answer is "no."

In addition, in the United States we have consistently adhered to the trite-sounding but immutable principle that we will have "a government of laws and not of men," and that is what this matter is all about. Should administrators and executives of the law be free to define "public policy" in the absence of legislative authority duly enacted by Congress? Again, the answer is "no."

The implications of continuing the policy of allowing the IRS to determine on its own those public policies denying tax exemptions was well stated by the district court in the Bob Jones case. There, the judge pointed out that Section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over such broad power, the district court observed: "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action -- a dilemma of constitutional proportions. Citizens could no longer rely on the law of Section 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny."

For example, if we were to endorse the theory on which the Service was proceeding before the Supreme Court, what would prevent the Service from revoking the tax exempt status of Smith College, a school open only to women? Does sex discrimination violate a clearly ennunciated public policy? Apparently someone in the state of Massachusetts thinks so, because litigation on this issue is currently going forward in the state courts of Massachusetts.

What about religious organizations that refuse to ordain priests of both sexes? And could the Commissioner decide that if Black Muslim organizations refuse to admit whites they should be denied a tax exempt status because they discriminate?

Further, should the IRS Commissioner be permitted -- in the absence of legislation -- to determine what is national policy on abortion? Should hospitals that refuse to perform abortions be denied their tax exempt status? Or, reading Federal policy another way, should hospitals that do perform abortions be denied their tax exempt status?

These extremely difficult but real issues illustrate the need for Congressional action on the question of tax exempt schools which discriminate on the basis of race. Here perhaps we have a national consensus which should be embodied in statute so that the Internal Revenue Service has appropriate guidance. To leave the judgment solely to the Service is not the responsible course.

It is simply because these issues are so difficult and fundamental to our society that they should not be left to an administrative determination by employees of the Federal Government, but rather should be determined by the elected representatives of the American people. It is for this reason that the Administration has developed and proposed the Administration's bill which is designed to give a clear Congressional mandate on these matters.

Thus the Administration urges the Congress to exercise its authority and responsibility to provide guidance on these matters so that there will be a basis in law to deny tax exempt status to educational institutions that discriminate on the basis of race.

DISCUSSION OF LEGISLATION

Finally, I turn to a description of the Administration's bill, which is before the Committee this morning. Section one of that bill directly addresses the issue before us. Specifically, a new Section 501(j) would be added to the Internal Revenue Code to deny 501(c)(3) treatment and 501(a) treatment if the school practices racial discrimination.

Failure to be described in Section 501(c)(3) also means that the organization is not within the exemptions from Federal social security and employment taxes provided in the Code. Correlative changes are made to the income, estate and gift tax deduction sections to provide that no deduction will be allowed for contributions to such organization.

The organizations covered are defined in new section 501(j)(1) to include those that maintain a regular faculty and curriculum and normally have a regularly enrolled body of students in attendance at the place where its educational

activities are regularly carried on. Generally, this is the same definition as appears in Code Section 170(b)(1)(A)(ii), and parallels the class of schools covered by the IRS's prior published procedures. Further, consistent with Rev. Rul. 75-231, the definition covers all organizations maintaining these schools.

New Code Section 501(j)(2) defines "racially discriminatory policy." Generally, under the bill, a school has such a policy if it refuses to admit students of all races (defined to include also color and national origin) to the rights, privileges, programs, and activities usually accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, or other programs in a manner that does not discriminate on the basis of race. This definition generally conforms to that first established by the court in the Green litigation and carried forward by the IRS in Rev. Rul. 71-447 and subsequent pronouncements.

Additionally, Section 501(j)(2) contains an explicit provision in recognition of the legitimate interests of religious-based schools. Thus, under the bill, an admissions policy or a program of religious training or worship that is limited to, or grants preference or priority to, members of a particular religious organization or belief would not be considered a racially discriminatory policy. Thus, schools may confine admission and training to persons of a particular religion. The protection, however, will not apply if the policy, program, preference or priority is based upon race or upon a belief that requires discrimination on the basis of race. Pursuant to this rule, we expect that Bob Jones and Goldsboro would be denied their tax exempt status if they continue their past racial practices.

To ensure that the express congressional sanction does not grant a windfall to discriminatory schools and their contributors, previously denied the benefits of exemption, the legislation applies retroactively to July 10, 1970, the date the IRS first announced it would not grant exemption to private schools with discriminatory policies. We believe that a retroactive effective date is essential to preserve the national policy of denying tax exempt status to schools that racially discriminate, and that the retroactivity is constitutional.

Finally, the bill contemplates that present procedures regarding grant or denial of tax exemption will remain in place. Thus, a nonexempt organization must generally submit to the IRS an application requesting recognition of exemption, together with supporting material enabling the IRS to rule on all relevant issues, including racial discrimination. Organizations whose exemptions have been recognized will be subject to periodic examination to ensure continuing compliance with all applicable requirements.

If discrimination is found to exist, revocation will be proposed and advance assurance of deductibility of contributions will be suspended. Thereafter, the organization will be accorded substantial administrative appeal, including review by the National Office. If the finding of discrimination is sustained, exemption will be revoked and the organization, of course, has the opportunity to seek judicial review.

We have proposed this legislation to deal with the immediate need to empower the Internal Revenue Service with unmistakable authority to deny tax exemption to racially discriminatory schools. We recognize that it will not resolve the difficult definitional problems faced by the Internal Revenue Service in giving meaning to such general terms as "charitable" and "educational," and we invite further Congressional action to define better standards in those areas as well. We will, pending such action, continue to support the Internal Revenue Service in applying the 1959 regulations in the charitable area and in its efforts to deny exemption to those organizations engaged in illegal activities.

This concludes my testimony. I will be pleased to answer any questions you may have.

Department of Justice

STATEMENT

OF

EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL

BEFORE THE

SENATE FINANCE COMMITTEE
UNITED STATES SENATE

CONCERNING

TAX EXEMPTIONS UNDER SECTION 501(c)(3) OF THE INTERNAL REVENUE CODE OF 1954

FEBRUARY 1, 1982

Mr. Chairman and Members of the Committee --

I am pleased to appear before this Comittee today to explain the Department of Justice's role in the decision by the Administration to change its position in the Bob Jones University and Goldsboro Christian Schools cases, and to review with you the legal basis for that decision. With me on the panel is William Bradford Reynolds, the Assistant Attorney General for Civil Rights.

There is, I believe, no issue that deserves more serious attention, or requires more thoughtful reflection, than the one now being addressed by this Committee. The announcement on January 8, 1982, regarding the eleven-year practice of the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code has understandably evoked nationwide controversy. It has erroneously been perceived by many as a dramatic retreat from the commitment of this Administration to pursue an active and vigorous enforcement policy in the area of civil rights. And, some have characterized the decision as an open endorsement of racial discrimination.

Mr. Chairman and members of this Committee, the charge that racial considerations entered the Administration's decision concerning the tax-exempt status of private schools is absolutely false. The President's record, both in word and deed, speaks unmistakably and unequivocally to his abhorrence of racial discrimination. In submitting to the President of the Senate and the Speaker of the House of Representatives the tax-exemption legislation that this Committee will now consider, the President declared:

"I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and our citizens hold dear, and I believe this repugnance should be plainly reflected in our laws."

These words reflect not only the President's sentiments, but those of his Administration and of the overwhelming majority of the American people who deplore racial discrimination in any form. The Attorney General emphatically underscored this position just last week in a colloquy with Senator Kennedy during his appearance before the Senate Subcommittee on the Constitution to support the extension of the Voting Rights Act. "I yield to no man," he stated, "in my abhorrence of racial discrimination."

I, too, Mr. Chairman, yield to no man in my intolerance of discrimination, and I know Mr. Reynolds shares that view. On this point, we are adamant and uncompromising. This Administration remains dedicated to continuing the hard-fought battle to eradicate racial discrimination from our Nation.

This Committee has inquired as to how the Department of Justice, as part of an Administration committed to combatting racial discrimination, could have advised the Department of Treasury that the Internal Revenue Service lacks authority to deny tax-exempt status to private nonprofit schools that discriminate on the basis of race. The answer, Mr. Chairman, is that we undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area, and concluded that there is neither a

constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.

While much has been written in the past few weeks about how clear the law is on this point, the fact remains that the very reason for addressing the question was because the precise legal issue was before the United States Supreme Court in the Bob Jones University and Goldsboro cases. Thus, at least four members of the Court considered the question sufficiently unsettled to warrant Supreme Court review.

I am here today to explain the reasons for the Department's advice regarding the authority of the Internal Revenue Service, and to describe the legal deliberations that antedated that advice. While some undoubtedly disagree with the Department's legal position, no one can fairly attribute racial motives to our decision, nor justifiably accuse us of acting irresponsibly or in derogation of our obligation to resist racial discrimination in all forms through vigorous enforcement of the Constitution and federal law.

A recitation of the events that culminated in the Department's conclusion that the Internal Revenue Service lacks authority to employ federal public policy to deny tax-exempt status to nonprofit private schools is necessary to appreciate fully the decision that was made.

In February 1981, a panel of the Fourth Circuit Court of Appeals in Bob Jones University v. United States, ruled by a 2-1 vote that the denial of tax exemptions to private schools on public

policy grounds is authorized by Section 501(c)(3) of the Internal Revenue Code of 1954. That decision was followed by a second panel decision of the Fourth Circuit, again divided 2-1, in Goldsboro Christian Schools v. United States. The court in Goldsboro "simply affirm[ed] the district court for the reasons advanced in the Bob Jones University case." Both schools filed writs of certiorari seeking review of the decisions by the United States Supreme Court.

The United States participated in both Bob Jones and Goldsboro in the Fourth Circuit, and there argued that the IRS practice was authorized by statute.

In September 1981, officials of the Department of Justice met with officials from the Internal Revenue Service to discuss the Government's response to the pending certiorari petitions. The IRS urged that the United States acquiesce in the petitions because it believed that a definitive Supreme Court ruling was both needed and desirable regarding the authority of the Service to invoke public policy as a basis for denying tax exemptions. The Department of Treasury did not participate in these discussions.

On September 19, 1981, the Department of Justice filed a Brief for the United States in the Supreme Court that urged, as IRS had requested, that the petitions be granted. That Brief, following the position that the Government had taken in the court of appeals, stated an intent to support the authority of the IRS to deny tax exemptions to Bob Jones and Goldsboro, if the cases were heard on the merits.

In October 1981, the Supreme Court granted certiorari in the Bob Jones and Goldsboro cases. Following the grants of certiorari, the Tax Division undertook to prepare a draft brief on the merits for review by the Solicitor General's office. That effort was completed sometime in late November or early December and -- as had been the case throughout these litigations in light of the unmistakable civil rights implications involved -- copies were distributed to the Civil Rights Division for review and comment.

In early December, 1981, Mr. Reynolds, and others in the Department who had reviewed the Tax Division draft, voiced concern to me over the claimed legal basis for IRS authority to deny tax exemptions to private schools under Section 501(c)(3). For Mr. Reynolds, the issue was particularly troublesome. As the chief law enforcement official of the Administration in the area of civil rights, he recognized fully the implications of a determination that the IRS had been acting without sufficient legal basis in this area since 1970. At the same time, he believed that the Administration should not take a position in the Supreme Court countenancing unauthorized administrative action, if our legal analysis convinced us that the position of the Fourth Circuit could not be sustained.

On this point I fully agreed. While the entire focus of media attention on this issue has been in terms of the civil rights implications -- which certainly is understandable -- there is another equally fundamental consideration that seems to have been

largely overlooked. The Bob Jones and Goldsboro cases raise in the starkest terms an issue that goes to the very heart of our constitutional form of government. Under Article I of the Constitution, the legislative powers in this country are vested in the Congress of the United States, not in the Judicial or the Executive Branches. It is for Congress to make national public policy by the enactment of laws and it is Congress' responsibility to devise by law the sanctions to be imposed on those individuals and institutions in our society who fail to adhere to those laws.

The concern of Mr. Reynolds and others in the Department over the Fourth Circuit's decisions in these cases -- a concern, I must say, that I shared -- is that it endorsed an administrative practice and procedure that was not simply lacking in Congressional authority, but seemed to be directly contrary to the legislative directive in Section 501(c)(3) of the Internal Revenue Code. If that proved in fact to be the case on a comprehensive legal analysis of the statute and its legislative history, the Internal Revenue Service -- not Congress -- was determining, on the basis of national policy, how the taxing laws should be administered and enforced. In the context of a private school practicing racial discrimination, there is no one in this room who would argue with the proposition that such behavior deserves the harshest condemnation. But, I also believe there are few here who would quarrel with the proposition that it is Congress'

responsibility to declare by law how that condemnation is to be expressed and what sanctions are to be applied.

If that Constitutional imperative is ignored in one politically sensitive area, it is difficult, indeed impossible, to see why it should not be ignored elsewhere. Let us assume that the Internal Revenue Service today may, without congressional authorization, determine on the basis of what it genuinely perceives as national policy considerations that tax-exempt status should be denied to private schools that discriminate on grounds of race. Tomorrow, the tax exemption could well be eliminated by the Service -- again without any congressional action -- for private schools that enroll only males or females. Presumably, hospitals that either do or do not permit abortions could be equally vulnerable to the taxing decision of the IRS on the basis of its perception of national policy in this area at any given point in time.

That prospect -- i.e., leaving the tax-exempt status of private schools and institutions to the sole discretion of the Internal Revenue Service based on its independent view at the moment of national policy goals -- runs counter to our most fundamental principles of democratic government. As the President of the United States made clear throughout his campaign and his first year in office, the laws of this country are to be made by Congress, not by "administrative fiat," or by judicial activism.

It is this principle that lies at the core of the legal issue in the Bob Jones and Goldsboro cases. While it comes to the fore

in a context that regrettably has overtones in the civil rights area, which inevitably ignites passionate debate, that fact should make us more, rather than less, attentive to reaching a proper legal conclusion. As offended as we are by the racially discriminatory practices of Bob Jones University and Goldsboro -- practices that we in no way condone or accept -- we cannot allow our strong disagreement with such policies to dissuade us from coming to grips with the hard legal issue that is presented. There is but one thing more important to the civil rights movement in this country than combatting racial discrimination, and that is that the combat be waged within the letter and spirit of the law as determined by Congress, not outside the law or in disregard of the federal statutes on the books.

In response to these concerns, I convened a meeting on December 8, 1981, with representatives of the Solicitor General's office, the Tax Division, the Civil Rights Division and other lawyers in the Department to discuss the legal position of the United States regarding the authority of the Internal Revenue Service to deny tax exemptions to private schools under Section 501(c)(3) of the Code. Following the meeting, I called the Deputy Secretary of the Treasury and suggested that Treasury might wish to review the Bob Jones and Goldsboro cases as they involved significant policy issues.

About two weeks later, a draft of a brief on the merits to be filed in the Bob Jones and Goldsboro cases, prepared by the Solicitor General's office, was delivered to the Treasury Department for its review and comments. Consultations with Treasury and IRS officials regarding the brief were held. As a result of those discussions, it was agreed that further work should be done on the draft brief to state more precisely the legislative basis for the IRS' assertion of authority to deny tax exemptions on public policy grounds when

racial discrimination is involved. Our objective was to determine whether a principled argument could be made to support denial of tax exemptions to private schools engaging in racial discrimination without significant risk of inviting denials of exemptions for a variety of other reasons as exercises of unfettered administrative discretion not authorized by Congress. This effort was undertaken on a coordinated basis by the Tax Division and the Solicitor General's office.

Another draft of the brief was forwarded to the Department of the Treasury on December 29, 1981. After reviewing it, Mr. Reynolds, I and others remained unpersuaded by the legal arguments advanced. It was our opinion that such arguments were not sufficient to justify denial of tax exemptions because of race discrimination without also empowering the Internal Revenue Service to deny exemptions for a host of other social policy reasons. Deputy Secretary McNamar advised me that his independent review of the draft brief resulted in the same reservations.

At that point, I asked Assistant Attorney General Reynolds to prepare a written analysis of the relevant legal and policy considerations in support of his position. He submitted a lengthy memorandum on the morning of January 6, 1982, copies of which have been provided to the Committee, addressing the relevant legal points and concluding that the IRS practice since 1970 was unauthorized under Section 501(c)(3). Simultaneously, the Solicitor General's office completed its work on the draft brief arguing the other side of the issue. The memorandum and draft brief were furnished to Treasury.

As it became apparent that the analyses undertaken by the Department of Justice and the Department of Treasury might eventuate in the Government's change of legal position in the Bob Jones and Goldsboro cases, two meetings were held with White House Counsel to review this probable development. On December 22, 1981, Department of Treasury officials met with the White House Counsel to discuss the policy decision under consideration regarding IRS authority. On December 30, both Justice Department and Treasury officials met with the White House Counsel to relate the probable changes in legal and policy positions in Bob Jones and Goldsboro.

Because both Departments foresaw that heated public criticism and protest might accompany a change of an eleven-year litigating and policy position in the pending Supreme Court cases, reviewing them with the White House Counsel and discussing the legal and policy analyses conducted by the Justice and Treasury Departments was entirely appropriate.

On January 6, 1982, the Attorney General held a two and one-half hour meeting during which all the legal arguments for and against the claimed IRS authority were presented by those in the Department who had worked on the issue. That meeting was attended by representatives of the Solicitor General's office and Tax Division, Mr. Reynolds, Mr. Olson, Assistant Attorney General of the Office of Legal Counsel, and members of the Attorney General's staff and my staff. At that meeting, it was determined that the

Department of Justice should advise the Department of the Treasury that our legal analysis led us to conclude that the IRS practice lacked statutory authority.

Following receipt of the legal advice of the Department of Justice and the policy recommendations of his officials, the Deputy Secretary of the Treasury decided that the tax exemptions to Bob Jones University and Goldsboro schools had been wrongfully denied and should be granted.

On January 8, 1982, the Attorney General, Brad Reynolds and I met with Secretary Regan and other Treasury officials to discuss the announcement of the Treasury decision. Later the same day, the Department of Justice, in accordance with the decision, filed a Memorandum with the Supreme Court, noting the intent of the Internal Revenue Service to revoke the relevant Revenue Rulings in this area and to grant tax exemptions to Bob Jones University and to Goldsboro, and urging that their cases be dismissed on the ground of mootness and that the decisions of the Fourth Circuit Court of Appeals be vacated.

On January 12, 1982, the White House announced that it would seek the legislation necessary to empower the Internal Revenue Service to deny tax exemptions to schools that discriminate on account of race, and, on January 18, 1982, proposed legislation was submitted to the Congress by the President.

Pursuant to a request by the Treasury Department, on January 29, 1982, we forwarded to Treasury an analysis of legal authorities which I now ask be included in the record of this hearing. This analysis restates the written and oral advice the Justice Department gave to the Treasury late in December and the first week of January. We also address in the analysis certain collateral legal questions which arose in the aftermath of the January 8 decision.

During the course of the Department's deliberations on the legal questions raised in the Bob Jones and Goldsboro cases, letters were received from Congressman Trent Lott expressing interest and views on the matter. In April 1981, Congressman Lott sent a letter to the Attorney General in which he urged the Department to reverse the legal position it advanced in the court of appeals in the Bob Jones case. On behalf of the Attorney General, I responded to Congressman Lott and informed him that the Department intended to acquiesce in the grant of certiorari in the Bob Jones case.

On October 30, 1981, Congressman Lott sent another letter to the Attorney General in which he advanced several legal reasons for the Department to reverse its legal position in the Bob Jones litigation. On December 15th, I informed the Congressman by letter that the United States would continue to argue in support of IRS authority to deny tax exemptions on the ground of federal public policy since the Department of Treasury, the client in the case, had not decided otherwise.

On December 21, 1981, I received a letter from Congressman Lott again urging that the Department of Justice reconsider its legal position in the Bob Jones case. Attached to that letter was what appeared to be a page from the President's correspondence log indicating the concurrence of the President with the views of Congressman Lott.

As with countless controversial cases involving the United States, the Department of Justice was aware of the views and concerns voiced by Members of Congress and others in the Bob Jones and Goldsboro litigation. On the other hand, the Department of Justice is entrusted with the responsibility of faithfully executing the laws and interpreting the Constitution and statutes. It would be a breach of this obligation if the Department of Justice were to depart from an objective legal analysis for political or other reasons. I can assure this Committee that the decision made by the Department to advise the Treasury Department that the Internal Revenue Service lacked authority to deny tax exemptions on the ground of federal public policy was made solely on the basis of objective legal analysis.

Mr. Chairman, I cannot state emphatically enough that this decision was compelled by the Department's view of the law -- specifically Section 501(c)(3) of the Internal Revenue Code of 1954. The pertinent language of Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals . . ." 26 U.S.C. Sec. 501(c)(3) (emphasis added). That language was interpreted by the three-judge federal district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), as requiring organizations satisfying any of the enumerated purposes also to be "charitable" in the common-law sense -- that is, in the sense that the organization's purposes and practices must accord with public policy -- in order to qualify for tax-exempt status. Green was summarily affirmed by the Supreme Court. Coit v. Green, 404 U.S. 997 (1971). However, summary affirmances traditionally have little precedential value, and in this instance, as the Supreme Court has itself subsequently noted, the special circumstances involved in Green made the summary affirmance of no binding significance.1/

1/ The Service's 1970 reinterpretation of Section 501(c)(3) was spurred by the Green litigation. In Green, parents of black public school students sued to enjoin the United States from according tax-exempt status under Sec. 501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Sec. 501(c)(3), but it reversed its position prior to entry of the district court's

Thus, the core question remained unresolved: did Congress intend by enactment of Section 501(c)(3) to authorize the Internal Revenue Service to withhold tax-exempt status from otherwise qualified organizations based on the organizations' adherence to practices deemed by the Service to conflict with public policy. As set forth in detail in the analysis of legal authorities submitted today, an examination of congressional intent has led the Department of Justice to conclude that it did not.

The search for legislative intent begins, of course, with the words of the statute to be construed. Congress, by separately enumerating eight distinct purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them in the disjunctive with the word "or," manifested a clear intent to accord tax-exempt status to any entity organized and operated for any one of the enumerated purposes or functions. This common-sense interpretation of the language of Section 501(c)(3) is reinforced by the settled canon of statutory construction requiring that related provisions be interpreted in para materia. Sections 503, 504, and 513 of the Code, sister provisions of Section 501(c)(3),

---

1/ (cont/d)
final decision in favor of plaintiffs. The Supreme Court's summary affirmance of Green, therefore, "lacks the precedential weight of a case involving a truly adversary controversy" and leaves open in the Supreme Court the question whether Section 501(c)(3) authorizes denial of tax-exempt status to racially discriminatory private schools. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

reiterate the separate and disjunctive purposes and functions described in Section 501(c)(3), thus reflecting the congressional intent to recognize each of the enumerated categories as a discrete and independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. Sections 503(b)(3) (1969), 504(a)(1) and (3) (1969), and 513(a).

Indeed, the regulations promulgated by the Service under Section 501(c)(3) expressly provide that "each of the purposes specified in [Section 501(c)(3)] . . . is an exempt purpose in itself [and] an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . ." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(1)(iii).

Where statutory language is so clear and unambiguous, courts traditionally decline to examine legislative history. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976). We did not end our inquiry with the plain meaning of the Code provision, however. Rather, we undertook a comprehensive review of the legislative history to ascertain whether it revealed support for the proposition that Congress intended to deny tax-exempt status to otherwise qualified organizations deemed by the Internal Revenue Service to violate public policy. We found none.

The provisions now contained in Section 501(c)(3) originated as part of the Tariff Act of 1894, which exempted from taxation organizations "conducted solely for charitable, religious or educational purposes." There is nothing in the legislative history

reiterate the separate and disjunctive purposes and functions described in Section 501(c)(3), thus reflecting the congressional intent to recognize each of the enumerated categories as a discrete and independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. Sections 503(b)(3) (1969), 504(a)(1) and (3) (1969), and 513(a).

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of this early revenue act, nor in the legislative history of the many subsequent congressional reenactments of this same basic provision, indicating that Congress intended that bona fide "educational" or "religious" organizations must also meet all characteristics of a common-law charity.

To the contrary, the interpretive regulations issued by the Internal Revenue Service in connection with these revenue acts, and followed by the Service for over 50 years, uniformly interpreted the word "charitable" in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense. Not until 1959 did the Internal Revenue Service broaden its regulatory definition of "charitable" beyond merely "relief of the poor" to include purposes such as "advancement of religion," "advancement of education or science," and "lessening of the burdens of Government." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(2). Even then, however, that same regulation, defines "educational" without any reference to the concept of charity, thus reflecting the Service's pre-1970 view that, although "charitableness" is not confined to "relief of the poor," an "educational" organization need not also be "charitable" in order to qualify for tax-exempt treatment under Section 501(c)(3).

In sum, Mr. Chairman, we were unable on the most painstaking examination of the statute and its history to find support for the position -- advanced by the IRS for the first time

in 1970 -- that private schools pursuing racially discriminatory policies could be denied a tax exemption. Indeed, the IRS had itself long maintained that such a denial would be unauthorized agency action. It was in fact arguing that very position in Green at the time of its sudden reversal in 1970 on explicit directions from the White House.

Nor could we find evidence of congressional action subsequent to 1970 that suggests ratification by both the House and Senate of the Service's practice in this area over the last eleven years. To the contrary, Congress recently expressed grave reservations concerning the authority of the IRS to deny tax-exempt status to organizations deemed to be in violation of public policy. Sponsors in both the House and the Senate of the Ashbrook Amendment to the Treasury, Postal Service and General Government Appropriations Act of 1980 maintained that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory practices. In barring the prospective use of funds for such purposes in the Ashbrook Amendment, Congress made it abundantly clear that it was leaving undisturbed the status quo with regard to denials of tax exemptions between 1970 and 1978 so as to provide a full opportunity for the legislature to consider the correctness of the Service's interpretation of Section 501(c)(3). By no conceivable stretch of the imagination can this legislative activity in connection with a rider to an

appropriations bill be regarded as approval or ratification of the very construction of Section 501(c)(3) that was at the time being so roundly criticized.

The legal conclusion seemed to us, Mr. Chairman, to be inescapable. Congress intended -- as deduced from the statute's language and legislative history, the Service's interpretive regulations, and subsequent congressional activity -- that Section 501(c)(3) exempt from income taxation "educational" organizations that are not also "charitable" as surely as it exempts "charitable" organizations that are not also "educational." The contrary construction accorded the statute by the district court in Green and the Fourth Circuit Court of Appeals in Bob Jones and Goldsboro does a disservice to the most basic canons of statutory construction and we cannot in good conscience support that position.

In reaching this conclusion, we looked as well at Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, to determine whether the grant of a tax exemption to a private school that racially discriminates would violate that federal statute. As you know, Mr. Chairman, Title VI prohibits racial discrimination under any program or activity "receiving Federal financial assistance," and the claim has been made by some that a tax exemption can be regarded as such assistance.

Quite frankly, this contention is wholly without merit. Title VI defines "Federal financial assistance" in terms of specified generic types of aid: grants, loans and contracts other than contracts of insurance or guaranty. None of these categories, understood in their ordinary sense, includes tax exemptions. This is underscored by the legislative history of the 1964 Act, which includes considerable discussion of the types of federal funding that would bring a program or activity within Title VI coverage and nowhere mentions tax exemptions as triggering such a result.

There is one district court case, McGlotten v. Connally, 338 F. Supp. 448 (1972), that equates tax exemptions with "Federal financial assistance." In reaching that result, the district court conceded that its conclusion found no support in either the language, agency interpretations, or the legislative history of Title VI. Nonetheless, it held that the "plain purpose" of the statute to promote nondiscrimination was sufficient to override the plain language and one-sided legislative history.

The logic of such reasoning has far-reaching ramifications. In essence, the district court in McGlotten viewed a tax exemption as a government subsidy, inexplicably equating it with a distribution of federal funds. If this view were to prevail, essentially all property and earnings of private parties would effectively belong to the government and a failure of Congress to tax would constitute

federal financial assistance. The Supreme Court explicitly rejected that concept in Walz v. Tax Commission, 397 U.S. 664, 675 (1970), holding that a state tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organizations. In our view, Walz is a complete answer to the Title VI assertion made in the McGlotten decision.

Having reached the conclusion that an argument to support the interpretation that had been given to Section 501(c)(3) since 1970 should not be advanced in the Supreme Court, we felt compelled to recommend to the Treasury Department that it no longer pursue that course. There was clear recognition at both the Department of Justice and the Department of the Treasury that such a reversal of position would likely be misunderstood and mischaracterized by many as encouragement, or at the very least tolerance, on the part of the government of what are sometimes referred to as "segregation academies." When confronted with the identical politically explosive issue in 1970, the Nixon Administration succumbed to the pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but legally unjustified.

This Administration, Mr. Chairman, has, as you well know, declined to operate on such a basis. The President has time and again demonstrated his commitment to principle over political

expediency. As a consequence, decisions have been made, and policies have been initiated, that evoke strong public criticism but are able to withstand the assaults because they are grounded on high principle. This is but another example of the Administration's commitment to that approach.

Here, the principle involved is among the most fundamental to our system of democratic government. The first sentence of the Constitution declares: "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." This provision, and similar grants of power to the Executive and Judicial Branches in Articles II and III of the Constitution, reflect a scheme of checks and balances integral to freedom and ordered liberty. Under Article II of the Constitution, once the meaning of a law is discerned, the Executive is charged with its faithful execution.

The Internal Revenue Service's practice since 1970 of denying tax exemptions to private schools that discriminate runs directly counter to that constitutional scheme. It opens the door for administrative agencies to "legislate" by administrative fiat, and, without guidance from Congress, to make fundamental policy decisions that impact directly on every citizen in this country. Such transgressions by the Executive on Congressional prerogatives are most inviting where the end being sought -- i.e., the removal of racial discrimination in our educational institutions -- is a common objective to which all

Branches of Government subscribe. But, it is in precisely such circumstances that we must be sure that principle wins out over emotion, no matter how difficult the decision may be.

Mr. Chairman, the power to grant or deny exemptions from taxation is legislative in nature. Congress has not yet authorized the Internal Revenue Service to withhold exemptions from private schools on the ground that they practice racial discrimination. The President has forwarded to the Congress legislation that would grant the IRS such authority. He has asked that you give this matter the very highest priority and enact the legislation as rapidly as possible.

This Administration is concerned with, and sensitive to, minority interests and civil rights concerns. In enforcing the many federal statutes that afford protections in this as well as other areas, we must, of course, uncompromisingly discharge our responsibility to uphold the Constitution and laws of this land. That responsibility cannot be carried out faithfully, and with full integrity, if we allow administrative agencies, no matter how well intended, to act on their own in seeking to achieve even the most laudable ends.

That was the fundamental issue in the Bob Jones and Goldsboro cases, and it was for the reasons that I have stated that the Department of Justice concluded as a matter of law, notwithstanding our repugnance for the racially discriminatory practices of the two schools, that the IRS practice since 1970 could no longer be supported.

Mr. Reynolds and I will be glad to answer any questions you may have.

Petitioner's Reply Brief

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RECEIVED
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SUPREME COURT, U.S.

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 81-3

BOB JONES UNIVERSITY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

PETITIONER BOB JONES UNIVERSITY'S RESPONSE TO PETITIONER GOLDSBORO CHRISTIAN SCHOOLS, INC.'S MOTION FOR DIVIDED ARGUMENT AND ADDITIONAL TIME

Petitioner Goldsboro Christian Schools, Inc., has moved the Court

(a) that 15 minutes additional time be granted petitioners, so that counsel for Bob Jones University would have 30 minutes for oral argument and counsel for Goldsboro Christian Schools, Inc., would have fifteen minutes for argument;

(b) but that, if such additional time is denied, the argument time be divided to allow 20 minutes for counsel for Bob Jones University and 10 minutes for counsel for Goldsboro Christian Schools, Inc.

In response to that motion, petitioner Bob Jones University states that, due to the extreme importance of this case nationally, it supports the motion insofar as it seeks the granting of 15 minutes of additional time for oral argument.

However, should such additional time not be granted, Bob Jones University opposes the motion insofar as it seeks divided argument, in that (assuming allowance of one half hour per side) the argument for petitioners in this consolidated litigation would clearly best be presented by one counsel. The issues of statutory construction and constitutionality raised by Bob Jones University include all issues raised by Goldsboro Christian Schools, Inc., the interests of the two institutions are not in conflict, and, within the confines of one half hour, a single comprehensive presentation will best serve justice and the Court.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

BOB JONES UNIVERSITY,	:	
Petitioner,	:	
v.	:	No. 81-3
UNITED STATES OF AMERICA,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that, on the 3rd day of December, 1981, I caused to be served, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, upon the following persons, by first class mail, postage pre-paid, one copy of Petitioner Bob Jones University's Response to Petitioner Goldsboro Christian Schools, Inc.'s Motion for Divided Argument and Additional Time in the above entitled case:

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DATED: December 3, 1981

William Bentley Ball
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Respondent's Brief

1

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CLERK

Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Internal Revenue Service had authority under Section 501(c)(3) of the Internal Revenue Code of 1954 to revoke the petitioners' tax-exempt status on grounds that private schools operated by petitioners had racially discriminatory policies and practices that contradicted national policy.

2. If the Service was authorized to enforce national policy in this manner, does the fact that the petitioners' practices were based on religious doctrine prevent the revocation action under the First Amendment.*

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* This brief sets forth the position of the United States on both questions presented. The Acting Solicitor General fully subscribes to the position set forth on question number two, only. His views on question one are set forth in the Brief for the United States filed in this Court in September 1981 in response to the petitions for certiorari in these cases. Those views are more fully developed in a draft brief on the merits which was ready to be printed for timely filing in early January 1982. Copies of that draft brief were furnished by the Department of Justice in late January 1982, pursuant to request, to the Senate Finance Committee and the House Ways and Means Committee, along with other documents requested by those committees.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No. 81-1. The order of the district court (Pet. App. 5a-18a) is reported at 436 F. Supp. 1314. The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

No. 81-3. The opinion and order of the district court dated December 26, 1978 (Pet. App. A38-A71) are reported at 468 F. Supp. 890. The opinion and order of the district court dated May 14, 1979 (Pet. App. A72-A86) are not reported. The opinion of the court of appeals (Pet. App. A1-A37) is reported at 639 F.2d 147.

JURISDICTION

No. 81-1. The judgment of the court of appeals (Pet. App. 53a) was entered on February 24, 1981, and the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on April 7, 1981 (Pet. App. 55a). The petition for a writ of certiorari was filed on July 2, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-3. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 81-3. The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on April 8, 1981 (Pet. App. A100-A101). The petition for a writ of certiorari was filed on July 1, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are Sections 170(a), 170(c), 501(a), 501(c)(3), 3121(b)(8)(B) and 3306(c)(8) of the Internal Revenue Code of 1954 (26 U.S.C.), and Section 1.501(c)(3)-1(d) of the Treasury Regulations on Income Tax (26 C.F.R.).

STATEMENT

A. Bob Jones University—No. 81-3

1. Petitioner Bob Jones University is a nonprofit organization incorporated in 1952 under the laws of South Carolina "for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures * * *" (Pet. App. A2-A3, A40-A41).[1] Petitioner provides instruction for students from kindergarten through college and graduate school,

[1] Unless otherwise indicated, "Pet. App." and "J.A." references in this portion of the Statement are respectively to the appendix to the petition and the joint appendix in *Bob Jones University* (No. 81-3).

enrolling more than 5,000 students and offering more than 50 accredited degrees in secular subjects (Pet. App. A3, A41; J.A. A63, A127-A128, A153, A211-A223). At the college level, it operates a school of education, a school of fine arts, a school of religion, a college of arts and sciences, and a school of business administration (J.A. A63, A127-A128). In its graduate schools, it offers courses in art, music, speech, radio and television, cinema, religion, and education (J.A. A227).

Petitioner also offers a separate nondegree, noncredit program entitled Institute of Christian Service, for persons who do not wish to undergo the rigors of academic pursuit (J.A. A75). The purpose of that program is to teach the principles of the Bible and to train Christian character (Pet. App. A3, A41). All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians. Students are screened as to their religious beliefs and their conduct is strictly regulated (Pet. App. A3-A4). However, more than 100 denominations are represented in the student body (J.A. 84).

Petitioner maintains a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. This policy is based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the Scriptures (Pet. App. A43). Prior to 1971, petitioner excluded blacks entirely from enrollment. From 1971 until 1975, married blacks and members of other minority races or ethnic groups were not excluded from enrollment, but petitioner continued to deny admission to unmarried blacks unless the applicant had been a staff member of the university for at least four years (*id.* at A4, A43). See *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). At that time, it was petitioner's judgment that, while a policy of excluding blacks altogether was not doctrinally required, denying admission to unmarried blacks was the

best means of implementing its prohibition against interracial dating and marriage (Pet. App. A43; J.A. A71-A72, A81-A82, A250; A. 209-210, 212).[2]

In response to decisions of the court of appeals in *Bob Jones University* v. *Johnson*, 529 F.2d 514 (4th Cir. 1975), and of the Supreme Court in *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), petitioner revised its admissions policy to permit unmarried blacks as well as married blacks to matriculate (Pet. App. A4, A43-A44; J.A. A250-A253). It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage, and it established disciplinary rules requiring the expulsion of any student who: (1) was a partner in an interracial marriage; (2) was affiliated with a group or organization advocating interracial marriage; (3) engaged in interracial dating; or (4) encouraged others to violate petitioner's rules and prohibitions against interracial dating (Pet. App. A4, A43-A44; J.A. A53-A54, A77-A80, A197-A198, A208-A209, A277). The university required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions (Pet. App. A42-A43; J.A. A132-A133).

2. Prior to 1970, the Internal Revenue Service ("Service") recognized petitioner as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 ("1954 Code") (26 U.S.C.). See *Bob Jones University* v. *Simon*, 416 U.S. 725, 735 (1974). On July 10, 1970, the Service announced that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racially discriminatory policies, and that it would not continue to treat gifts to such schools as deduct-

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[2] "A." refers to the separately bound record appendix filed in the court of appeals, Nos. 79-1215 and 79-1216.

ible contributions under Section 170.[3] See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230.

In November 1970, the Service sent letters to approximately 5,000 organizations operating private schools, including petitioner, announcing its new policy and requesting proof of nondiscriminatory admissions practices (J.A. A232-A234). Petitioner responded that it did not admit black students and, in September 1971, further stated that it had no intention of altering that policy. The Service therefore commenced administrative proceedings leading to the revocation of petitioner's tax exemption and of its advance assurance of deductibility.

In January 1976, after petitioner's attempt to enjoin the administrative proceedings had failed in the Supreme Court (see *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 735),[4] the Service issued a final notice of revoca-

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[3] The Service's interpretation of Section 501(c)(3) was spurred by litigation. In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), summarily aff'd per curiam *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under Section 501(c)(3) to private schools in Mississippi that discriminated against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501(c)(3), but reversed its legal position "in the midst of [the] litigation." 330 F. Supp. at 1156. As subsequently observed by this Court, the Court's summary affirmance of *Green* "lacks the precedential weight of a case involving a truly adversary controversy," and leaves open the question of whether a racially discriminatory private school is eligible for tax exemption under Section 501(c)(3). *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974).

[4] While the administrative proceedings preliminary to the revocation of its exemption were pending, petitioner sought injunctive relief to prevent the Service from taking final action on the revocation. *Bob Jones University* v. *Simon*, *supra*. This Court unanimously held that the action was barred by the Anti-Injunction Act (26 U.S.C. (& Supp. III) 7421(a)) and by the Declaratory Judgment Act (28 U.S.C. (& Supp. III) 2201), but suggested (416 U.S. at 746) the refund suit procedure ultimately employed by petitioners here.

tion, effective as of December 1, 1970 (Pet. App. A40, A87-A88, A89).

3. Seeking reinstatement of its tax exemption, petitioner initiated suit in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975 (Pet. App. A3, A40).[5] The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975 (*ibid.*). Following a trial, the district court held that Bob Jones qualified for tax exemption under Section 501(c)(3) of the 1954 Code as an institution organized and operated exclusively for religious and educational purposes, and that petitioner was not required to demonstrate a nondiscriminatory racial policy in order to so qualify (Pet. App. A45-A71).[6]

The district court explained that Section 501(c)(3) does not endow the Service with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over the breadth of such power, the district court observed (Pet. App. A67): "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action—a dilemma of constitutional proportions. Citizens could no longer rely on the law of § 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change

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[5] Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. 3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 727-728.

[6] In a separate suit against the Secretary of the Treasury and the Commissioner of Internal Revenue instituted by petitioner, the district court thereafter ordered those officials to restore petitioner's tax-exempt status and to publish advance assurances of deductibility of contributions to petitioner (Pet. App. A72-A86).

at the whim of some nonelected IRS personnel, producing bureaucratic tyranny."

A majority of the Fourth Circuit Court of Appeals reversed. Relying on the three-judge district court's decision in *Green* v. *Connally*, *supra*, the majority agreed with the Service that Section 501(c)(3) must be interpreted as incorporating the common law of charitable trusts as a gloss on each of the separately enumerated exemptive purposes in the statute. The panel majority further agreed with the *Green* conclusion (330 F. Supp. at 1156-1160) that to be eligible for tax-exempt status under Section 501(c)(3), "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy" (Pet. App. A7-A8) (footnote omitted). It observed that "[t]his view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable'" (Pet. App. A7-A8, n.6).

To buttress the conclusion that Section 501(c)(3) establishes a public policy test, the majority also relied on (Pet. App. A8) the following excerpt from a 1939 House Report explaining the theory animating Congress to exempt from taxation organizations devoted to charitable and other purposes:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).[7] Because petitioner's discriminatory practices violate clearly

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[7] The majority miscites the House Report as "H.R. Rep. No. 1820, 75th Cong., 3d Sess. 19 (1939)" (Pet. App. A8).

defined public policy rooted in the Constitution, federal prohibitions against federal assistance to racially discriminatory schools, and a federal statute (42 U.S.C. 1981) proscribing private acts of racial discrimination, the court of appeals concluded that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status * * *" (Pet. App. A10).

In so holding, the majority rejected petitioner's argument that application of the Service's nondiscrimination policy to it violates the Free Exercise Clause of the First Amendment, noting that the Service's policy would neither prohibit petitioner from adhering to its teachings nor force any individual student to violate his beliefs (Pet. App. A13-A14). With respect to petitioner's Establishment Clause claim, the majority concluded that "the uniform application of the [Service's] rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16) (emphasis in original).

Judge Widener dissented (Pet. App. A18-A37), concluding that "Bob Jones University is a religious organization" (Pet. App. A19) within the meaning of Section 501(c)(3), and that the panel majority, the Service, and the district court in *Green* v. *Connally*, *supra*, had misconstrued Section 501(c)(3) by insisting that each of the eight types of organizations identified in the statute as tax-exempt must also be "charitable" organizations under the common law of charitable trusts (Pet. App. A19-A20). Section 501(c)(3), Judge Widener observed, grants tax-exempt status to each class of organization enumerated in the statute, and because petitioner falls within one of those classes ("religious"), the Service lacked authority to deny the exemption granted by Congress (Pet. App. A20). Judge Widener further asserted that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimination in the context of private non-tax-funded religious institutions.

B. Goldsboro Christian Schools—No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc., is a North Carolina nonprofit organization incorporated in 1963 "to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *" (Pet. App. 6a).[8] At least since 1969, petitioner has maintained a regularly enrolled student body (750 students in 1973-1974) for kindergarten and grades one through twelve (Pet. App. 7a; J.A. 6-7), and has satisfied the requirements of North Carolina for secular education in private schools (see N.C. Gen. Stat. § 115-255 (repl. 1978)). Submissions to the State indicate that petitioner requires its high school students to take one Bible-related course during each semester. In keeping with petitioner's overall purpose and with the desire of its founders to provide a secular private school education in a religious setting, petitioner's practice is to begin each class with a prayer (Pet. App. 6a-7a).[9] Petitioner does not require that its students profess or subscribe to any particular belief. It does require, however, that its students adhere to certain standards of conduct that are consistent with the tenets held by petitioner (J.A. 68). Various religious denominations are represented in the student body (J.A. 69-70).

Based upon its interpretation of the Bible, petitioner has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of

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[8] Unless otherwise indicated, "Pet. App." and "J.A." references in this portion of the Statement are respectively to the appendix to the petition and record appendix in *Goldsboro Christian Schools* (No. 81-1).

[9] Although the Second Baptist Church of Goldsboro was active in petitioner's founding and operation, petitioner was incorporated as a separate legal entity (Pet. App. 6a-7a; J.A. 5-6).

social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God" (J.A. 10). Notwithstanding this policy, petitioner has accepted noncaucasians. Its policy in practice requires the exclusion only of members of the Negro race (Pet. App. 7a). Petitioner's president and principal believe that black students would be disinclined to abide by its tenets and practices because of the racial climate prevailing in the country and the pressures exerted by the positions of certain "militant" organizations (J.A. 81-93).

2. Pursuant to the Service's 1970 nondiscrimination ruling, the Commissioner determined that petitioner did not qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the 1954 Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the 1954 Code, and, in 1974, he assessed FICA and FUTA taxes against Goldsboro.

3. After making partial payment, petitioner instituted suit in the United States District Court for the Eastern District of North Carolina, seeking a refund of $3,459.93 of withheld federal social security and unemployment taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period (Pet. App. 5a, 7a-8a). On the parties' cross motions for summary judgment, the district court ruled that the Service had properly denied petitioner tax-exempt status under Section 501(c)(3) and the tax benefits associated with qualification as a Section 501(c)(3) organization, because petitioner's racially discriminatory admissions policy violated the declared public policy of the United States.

A majority of the Fourth Circuit Court of Appeals affirmed (Pet. App. 1a-3a). Finding the case "identical" to the *Bob Jones University* case, the court of appeals majority upheld the denial on the authority of that precedent. Judge Field dissented for the reasons stated by

Judge Widener in his dissenting opinion in *Bob Jones University* (Pet. App. 3a).

SUMMARY OF ARGUMENT

In 1970, the Internal Revenue Service reversed its long-standing practice under Section 501(c)(3) of the Internal Revenue Code of granting tax exemption to private educational institutions, without regard to their admissions policies, and announced that such institutions would no longer receive exemptions, and related tax benefits, if they discriminated on the basis of race. While recognizing and fully subscribing to the strong national policy in this country against racial discrimination in any and all forms, it is the position of the United States that this change of position by the Service finds no support in the language of Section 501(c)(3), or in its legislative history.

Under Article I of the Constitution and the Sixteenth Amendment, Congress has the power "to lay and collect" taxes, not the Executive Branch. As an exercise of that power, Congress has directed the Internal Revenue Service in Section 501(c)(3) of the Code to award tax exemptions, and related tax benefits, to private corporations pursuing any one of eight enumerated purposes, including, "educational" purposes. Nowhere has Congress qualified that grant of authority by providing that an institution eligible for exemption as "educational" can nonetheless be denied exempt status on public policy grounds, or because the institution is not also "charitable" in the common-law sense.

This is not to suggest that Congress cannot legislate in such a manner, but only that it thus far has not done so. In this regard, we do not find sufficient evidence of affirmative action by Congress since 1970 to warrant the conclusion that the Service's practice now under attack has received legislative ratification. Thus, the denial of tax exemptions to Bob Jones University and Goldsboro Christian Schools is, we submit, unauthorized agency action that should not, in the absence of congressional action, be

countenanced. Neither the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, nor prior case law compels a different result.

In the event that the Court should disagree with the government's foregoing statutory construction argument and conclude that Section 501(c)(3) of the Code authorizes the administrative denial of tax-exempt status to private schools that engage in racially discriminatory policies and practices, we agree with the court below that such a denial violates no First Amendment rights of petitioners under either the Free Exercise Clause or the Establishment Clause. Assuming that petitioners' racial discrimination is motivated by sincere religious beliefs, the court below noted that the Internal Revenue Service's policy would not prohibit petitioners from adhering to their teachings or force any individual student to violate his beliefs (81-3 Pet. App. A13-A14). The court of appeals further concluded that "the uniform application of the [Service's] rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (81-3 Pet. App. A16; emphasis in original). The United States believes these conclusions to be correct and therefore agrees that the court of appeals properly disposed of petitioners' First Amendment claims.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 501(c)(3) SHOW THAT THE COMMISSIONER DOES NOT HAVE THE DISCRETION TO DENY TAX-EXEMPT STATUS TO OTHERWISE EXEMPT ORGANIZATIONS FOR FAILURE TO CONFORM TO NATIONAL POLICY WITH RESPECT TO RACIAL DISCRIMINATION

Congress, the courts, and all recent Administrations have established a firm and uncontrovertible national policy against racial discrimination. This policy continues to guide all federal activities. The question addressed in

the first portion of this brief is the interaction of that policy with the administrative enforcement of the nation's revenue code. In the succeeding sections we argue—contrary to the Government's position below—that Section 501(c)(3) does not permit the Commissioner of Internal Revenue to withhold congressionally authorized tax exemptions from otherwise qualified "religious" and "educational" organizations based solely on an administrative determination of failure to conform to the national policy. Our contention is not that the policy, which we fully accept and implement, is wrong, but that the Internal Revenue Code—from which all the Commissioner's authority is derived—neither authorizes nor contemplates this kind of broad administrative discretion.

The threshhold legal question presented is one of statutory construction: Did Congress intend to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that maintain racially discriminatory admissions policies or other racially discriminatory practices? In answering this question affirmatively, the court of appeals, principally in reliance on the district court in *Green* v. *Connally*, *supra*, concluded (1) that Congress intended all eight classes of organizations listed in Section 501(c)(3) to qualify as "charitable," and (2) that Congress used the term "charitable" in Section 501(c)(3) in its common-law sense—that is, in the sense that an organization cannot qualify as "charitable" if its purposes or practices violate public policy. This construction of Section 501(c)(3) is at odds with the statute's language, its legislative history, and other objective evidence of legislative intent, and it should not be accepted by this Court.

1. The search for congressional intent must, of course, begin with the words of the statute itself. See, *e.g.*, *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 (1981); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). Section 501(c)(3) exempts from taxation "[c]orporations * * * organized and operated ex-

clusively for religious, charitable, scientific, testing for public safety, literary, *or* educational purposes, * * * *or* for the prevention of cruelty to children or animals * * *." 26 U.S.C. (Supp. I 1971) 501(c)(3) (emphasis supplied).

By its very terms, the legislative enumeration of eight purposes or functions entitling nonprofit corporations to tax-exempt treatment is framed in the disjunctive, thus manifesting Congress' intent to accord tax-exempt status to any organization organized and operated for any one of the designated purposes or functions. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise"). The distinct references in Section 501(c)(3) to "educational" *or* "charitable" organizations confirms "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." *Prince Edward School Foundation* v. *United States*, 450 U.S. 944, 947 (1981) (Rehnquist, J., joined by Stewart and Powell, J.J., dissenting from denial of certiorari).

This reading of Section 501(c)(3) assigns to the words used by Congress their ordinary meaning. It is reinforced by the settled canon of statutory construction requiring that related statutory provisions be interpreted together. *Kokoska* v. *Belford*, 417 U.S. 642, 650 (1974); *United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). Sections 503, 504, and 513 of the 1954 Code, sister provisions of Section 501(c)(3), reiterate the separate and disjunctive purposes or functions described in Section 501(c)(3), thereby underscoring the congressional intent to recognize each category enumerated in Section 501(c)(3) as a discrete and independent "basis for * * * exemption under Section 501(a)." See 26 U.S.C. (1964 ed.) 503(b)(3), 504(a)(1) and (3), and 513(a). In this regard, prior to 1969 Section 503 denied tax-exempt status to an organization otherwise qualified under Section 501(c)(3) if

it engaged in certain prohibited transactions.[10] Section 503(b) provided in pertinent part:

> This Section shall apply to any organization described in section 501(c)(3) * * * except—
>
> (1) a religious organization * * *;
>
> (2) an educational organization * * *;
>
> (3) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its *charitable, educational, or other purpose or function* constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public; * * * [emphasis supplied].

The language underscored above, which also appeared in the pre-1969 versions of Sections 504(a)(1) and (3),[11]

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[10] References to organizations described in Section 501(c)(3) were deleted from Section 503 in 1969.

[11] Section 504(a)(1) and (3) provided for the denial of tax-exempt status to any organization whose retained income during the taxable year is

> unreasonable in amount of duration in order to carry out the charitable, educational, or other purpose or function constituting the basis for exemption under section 501(a) of an organization described in section 501(c)(3); or * * *
>
> * * * * * *
>
> (3) * * * invested in such a manner as to jeopardize the carrying out of the charitable, educational, or other purpose or function constituting the basis for exemption under section 501(a) of an organization described in section 501(c)(3).

Substantially identical language was contained in Section 3814 of the 1939 Internal Revenue Code (26 U.S.C. 1952 ed.)). This Section 504 was repealed by Congress in 1969. Pub. L. No. 91-172, Section 101(j)(15), 83 Stat. 527.

and appears in the current version of Section 513(a),[12] plainly reflects Congress' intent (1) that "charitable" purposes be viewed as separate and distinct from "educational" purposes and any other "purpose or function" enumerated in Section 501, and (2) that each purpose or function constitute a sufficient and independent basis for exemption under Section 501(a).[13]

Nonetheless, the Fourth Circuit Court of Appeals read Section 501(c)(3) to provide tax-exempt status only to institutions that are organized and operated for one of

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[12] Section 513(a) provides, in pertinent part, that the term "unrelated trade or business" in the context of Section 511 (which imposes a tax on unrelated business income of otherwise tax-exempt organizations) means "any trade or business the conduct of which is not substantially related * * * to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501 (or, * * * to the exercise or performance of any purpose or function described in section 501(c)(3)), * * *." Substantially identical language appeared in Section 422(b) of the 1939 Internal Revenue Code.

[13] Regulations promulgated by the Internal Revenue Service also reflect an interpretation of the statutory language as affording tax-exempt status to any organization qualifying under one of the categories enumerated in Section 501(c)(3), without regard to whether it also accords with the characteristics of a common-law charity. Under Section 1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for *one or more of the following purposes*: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. 1.501(c)(3)-1(d)(1)(i) (emphasis supplied). The regulations state further that

> [s]ince *each* of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. * * * For example, if an organization claims exemption on the ground that it is 'educational', exemption will not be denied if, in fact, it is 'charitable'.

26 C.F.R. 1.501(c)(3)-1(d)(1)(iii) (emphasis supplied).

the designated purposes *and* are also qualified as common-law charities. In suport of this interpretation, the court cited Section 170 of the 1954 Code, which, it asserted, "places the separately enumerated purposes in [Section 501(c)(3)] under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes." (81-3 Pet. App. A7 n.6). The plain terms of Section 170, however, contradict the court's construction of Section 501(c)(3).

Subsection (c) of Section 170 defines "charitable contributions" in relevant part as follows:

> (c) Charitable contribution defined.
>
> For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of—
>
> * * * * *
>
> (2) A corporation, trust, or community chest, fund, or foundation—
>
> * * * * *
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, *or* educational purposes, * * * *or* for the prevention of cruelty to children *or* animals; * * *.

26 U.S.C. 170 (emphasis supplied). The definition of the term 'charitable contribution" relates solely to Section 170, and derives its meaning in part on the basis of the purposes for which certain organizations are organized and created; namely, "religious, charitable, scientific, literary, *or* educational [*or* specified other] purposes." Each of these distinct purposes separately and independently qualify an organization to receive "charitable contributions."

Nothing in Section 170 so much as hints at the proposition advanced below that an organization eligible to receive what the drafters of Section 170 have chosen to call "charitable contributions" must be endowed with a "charitable"

purpose within the meaning of Section 501(c)(3). Nor has Congress signalled elsewhere that it intended Section 170 to be so interpreted. Reliance by the court of appeals on this particular section of the Code is therefore misplaced.[14]

Based on the foregoing, the plain language of Section 501(c)(3) and its sister provisions, the structure of the 1954 Code, and the Service's interpretive regulations (see note 13, *supra*) require the conclusion that Congress intended to afford tax-exempt status to any organization organized and operated exclusively for any one of the purposes or functions enumerated in Section 501(c)(3).

In sum, "Congress has spoken in the plainest of words" (*TVA* v. *Hill*, 437 U.S. 153, 194 (1978)) in Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational."[15] The contrary reading of the legislation by the court of appeals is incorrect.

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[14] Moreover, if all organizations which receive "charitable contributions" were required to conform to common-law notions of charity, the requirement of Section 170(c)(2)(C)—that no part of the earnings of an organization which receives "charitable contributions" may "inure[] to the benefit of any private shareholder or individual"—would be superfluous. See page 20, *infra*.

[15] Even if one assumes that Congress did intend all tax-exempt organizations to qualify as "charitable" under Section 501(c)(3), it is doubtful that Congress used the term "charitable" in its common-law sense. As Lord McNaughten observed in *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common-law meaning, separate references in Section 501(c)(3) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would

2. Although the clarity of the language used by Congress in Section 501(c)(3) makes an examination of the statute's legislative history unnecessary, *see, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 199, 201 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961), a review of that history provides no support for the construction of Section 501(c)(3) endorsed by the court of appeals.

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, ch. 349, 28 Stat. 556,[16] which provided in pertinent part: "[N]othing herein contained shall apply to * * * corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes." There is no indication in the legislative history that Congress incorporated, or had reference to, the "common law of charitable trusts" in enacting this taxing statute.

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, Section II, 28

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thus betray a fundamental axiom of statutory construction: statutes are to be construed to give effect to each word, and no one part of a statute should be interpreted so as to render another part of the statute redundant. *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-308 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

Notably, the Service followed this axiom during the initial period of Section 501(c)(3)'s history and, accordingly, interpreted "charitable" in its "popular and ordinary sense" rather than in its common-law sense. *See, e.g.*, I.T. 1800, II-2 Cum. Bull. 152, 153 (1923) (discussing the intended meaning of the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 (Section 501(c)(3)'s predecessor)). This contemporaneous administrative interpretation of the statute clearly is not without significance. *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961). *See NLRB* v. *Boeing Co.*, 412 U.S. 67, 75 (1973) ("a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference * * *"). *See also* discussion in text at pages 19-22, *infra*.

[16] This income tax act was later declared unconstitutional by the Supreme Court in *Pollock* v. *Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895).

Stat. 114, 166. Section II(G)(a) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual * * *.

This legislation broadened the 1894 exemption to include "scientific" corporations, and added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, however, income of a charity could not inure to the benefit of a private person. See 4 A. Scott, *The Law of Trusts* § 376 (2d ed. 1956). There obviously would have been no need to include such a requirement in the statute if Congress had intended to condition tax exemption on satisfying the requirements of a common-law charity.

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 18, Section 231(6), 40 Stat. 1076, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 136, Section 231(6), 42 Stat. 253, further expanded the statute to exempt "any community chest, fund, or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad common-law sense. Moreover, as previously noted (*supra*, note 15) in 1923 the Service interpreted the word "charitable" in Section 231(6) of the Revenue Acts of 1918 and 1921 in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of

1924, 1926, 1928 and 1932," and regulations issued by the Service under those acts continued to define the term "charitable" to mean "relief of the poor." Treas. Reg. 65, Art. 517 (1924 Revenue Act). "Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor";[16]

The Revenue Act of 1934, ch. 277, Section 101(6), 48 Stat. 700, carried forward unchanged the exemption provision of prior revenue acts, but added the requirement that no substantial part of the activities of an exempt organization can involve the carrying on of "propaganda" or "attempting to influence legislation." Once again, the addition of the requirement would have been unnecessary if Congress had intended for all organizations to qualify as common-law charities in order to be exempt from taxation. See 4 A. Scott, The Law of Trusts § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 690, Section 101(6), 49 Stat. 1674, and the Revenue Act of 1938, ch. 289, Section 101(6), 52 Stat. 481, also carried forward the same exemption, and the regulations promulgated under these Acts continued to define the term "charitable" as "relief of the poor." See Treas. Reg. 86, Art. 101(6)-1 (1934 Revenue Act); Treas. Reg. 94, Art. 101(6)-1 (1936 Revenue Act); Treas. Reg. 101, Art. 101(6)-1 (1938 Revenue Act).

In the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1 ("1939 Code"), Congress exempted from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938. During the 15 years in which the 1939 Code re-

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[15] Revenue Act of 1924, ch. 234, Section 231(6), 43 Stat. 282; Revenue Act of 1926, ch. 27, Section 231(6), 44 Stat. 40; Revenue Act of 1928, ch. 852, Section 103(6), 45 Stat. 813; Revenue Act of 1932, ch. 209, Section 103(6), 47 Stat. 193.

[16] Treas. Reg. 69, Art. 517 (1926 Revenue Act); Treas. Reg. 74, Art. 527 (1928 Revenue Act); Treas. Reg. 77, Art. 527 (1932 Revenue Act).

mained in effect, the Service issued three sets of regulations, each of which defined the term "charitable" in its popular and ordinary sense. See Treas. Reg. 103, § 19.101 (6)-1 (1939 Code); Treas. Reg. 111, § 29.101(6)-1 (1939 Code); Treas. Reg. 118, § 39.101(6)-1(b) (1939 Code)."

Section 501(c)(3) of the 1954 Code, ch. 736, 68A Stat. 163, continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, and added to the list of exempt entities those organizations which are organized and operated for the purpose of "testing for public safety." In addition, Congress tightened the restrictions on political activities of tax-exempt organizations.[19]

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from sections 101 and 421 of the 1939 Code. No change in substance has been made except that employees' pension trusts, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954) (emphasis supplied).

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[19] The House Report on the 1939 Code explained that tax exemptions are granted by Congress to certain types of organizations in recognition of their performance of functions that promote the general welfare and that might otherwise be provided by the government. See page 7, supra. Contrary to the court of appeals' suggestion in the Bob Jones University case (Pet. App. A8), the Report does not indicate that Congress intended to endow the Internal Revenue Service with authority to disqualify a designated organization from tax-exempt status upon an agency determination that one or more of the organization's practices affront an agency concept of federal public policy as informed by the "general welfare." To the contrary, Congress made a determination that organizations within the terms of Section 501(c)(3) advance the general welfare, and did not invest the Service with authority to determine on a case-by-case basis whether particular practices of a bona fide qualifying organization sufficiently detracted from the general welfare to warrant denial of a tax exemption.

[20] The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

It was not until 1959 that the Internal Revenue Service undertook to expand its interpretation of "charitable." In Section 1.501(c)(3)-1(d)(2) of its 1959 Regulations, the Service concluded:

> The term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency * * *.

The purpose of this regulation is to clarify that the meaning of "charitable" is not "limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes"; for to so limit the term would render it redundant in the statute. Notably, the regulation does not suggest that organizations devoted to other purposes enumerated in Section 501(c)(3), such as "educational" and "religious" purposes, must also serve "charitable" purposes.[21] Indeed, the same regulation defines "educational" without reference to the notion of charity:

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[21] Were the Service's regulations to be so interpreted they would be inconsistent with the plain language of Section 501(c)(3) and would have to fall. The Supreme Court outlined the limits of the Executive's interpretive powers in *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be

> The term 'educational', as used in section 501(c)(3), relates to—
>
> (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> (b) The instruction of the public on subjects useful to the individual and beneficial to the community.
>
> 26 C.F.R. 1.501(c)(3)-1(d)(3) (1959) (emphasis supplied).

The record is thus overwhelming that, since 1894, Congress has consistently and repeatedly manifested an intent to exempt from income taxation corporations organized for purely "educational" or "religious" purposes, as well as corporations organized for purely "charitable" purposes. The Commissioner of Internal Revenue so construed Section 501(c)(3) and its predecessors until 1970—some 57 years after Congress' initial enactment of the relevant statutory language in the Tariff Act of 1913. An administrative reversal of position so many years later provides no legal basis for ascribing to a much earlier Congress an intent patently at odds with the very words of the statute.[22]

8. The court of appeals, following the district court in *Green*, held otherwise largely on the strength of *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958), which is said to stand for the proposition that "tax benefits such as deductions and exclusions generally are sub-

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delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

[22] Obviously, the Commissioner's 1970 revenue ruling does not even arguably qualify as "a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." *National Muffler Dealers Association* v. *United States*, 440 U.S. 472, 477 (1979).

ject to limitation on public policy grounds" (Pet. App. A8). In *Tank Truck*, the taxpayer urged that fines paid for violating state maximum weight laws were "ordinary and necessary" expenses and thus allowable as deductions from gross income under the predecessor to Section 162(a) of the 1954 Code.[2] The Supreme Court affirmed the Commissioner's disallowance of the deduction, holding that an expense is not "necessary" to the operation of a business "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." 356 U.S. at 33. Observing that "[d]eduction of fines and penalties uniformly has been held to frustrate state policy in severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature," the Court concluded that Congress did not intend to allow income tax deductions for fines incurred to punish violations of state penal laws. 356 U.S. at 35-36.

Unlike the explicit limitation placed by Congress on the deductibility of business expenses (*i.e.*, that they be "ordinary and necessary"), tax-exempt status under Section 501(c)(3) is accorded to "corporations * * * organized * * * for * * * educational purposes" simpliciter. No similar "ordinary and necessary" standard applies under the exemption statute so as to warrant the court of appeals' reference in this context to the wholly separate statutory construction question involved in *Tank Truck*. Indeed, even in the context of "ordinary and necessary" business deductions under Section 162(a), this Court has admonished that the "public policy" exception to the general rule of deductibility is "sharply limited and carefully defined." *Commissioner* v. *Tellier*, 383 U.S. 687, 691, 693-694 (1966). As the *Tellier* Court noted (*ibid.*):

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[2] The fines assessed against the taxpayer were for violations of penal statutes enacted to protect state highways from damage and to ensure the safety of highway users.

> [T]he federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes.

Moreover, Congress circumscribed the denial of tax deductions on grounds of public policy in the aftermath of *Tank Truck*. In 1969 and 1971, Congress enacted rules explicitly limiting the public policy doctrine of nondeductibility to fines paid for violations of law and to illegal bribes, kickbacks, and similar payments. See 26 U.S.C. 162(c) and (f). The Senate Finance Committee's report (No. 91-552) accompanying the 1969 enactment stated: "Public policy, in other circumstances, generally is not sufficiently clearly defined to justify the disallowance of deductions." 1969-3 Cum. Bull. 423, 597 (emphasis supplied). See Bittker and Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 75 (1972).

In light of these subsequent developments, the public policy doctrine announced in *Tank Truck*—even if transferable in its severely narrowed form to the present situation (which it is not)—provides no meaningful support for the result reached below. Instead, resolution of the statutory issue depends on the language of Section 501(c)(3) and its history. We have already shown where the legislative analysis leads, and that reading of the statute must prevail until amended or altered by explicit congressional action.

4. No such subsequent legislation has been passed, and, to the extent that Congress has visited the tax exemption question since 1970, there is no basis to conclude that it has ratified or otherwise acquiesced in the construction given Section 501(c)(3) by the *Green* court and the court of appeals.

a. As Judge Widener noted in dissent (81-3 Pet. App. A28-A31), Congress has expressed misgivings regarding

the Service's recent activities in the area of tax exemptions to private schools. In 1978 and 1979, the Service sought to supplement its procedures for verifying whether the actual practices of private schools conformed to the schools' announced policies of nondiscrimination. 43 Fed. Reg. 37296-37298 (1978); 44 Fed. Reg. 9451-9455 (1979). The controversial nature of those proposals prompted congressional hearings. *Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979). While some of the witnesses testifying at those hearings assumed that Section 501(c)(3) authorized the Service to deny tax exemptions to private schools with racially discriminatory policies (see, *e.g.*, *id.* at 1176), other witnesses indicated that the Service had no such power (see *e.g.*, *id.* at 586).

In response to the controversy over the proposed revenue procedures, Congress acted to prevent the Service from enforcing its proposed regulations and from devising any additional procedures for enforcing its policy of denying tax-exempt status to racially discriminatory private schools. The Dornan Amendment, Section 615 of the Treasury, Postal Service, and General Government Appropriations Act of 1980 ("1980 Appropriations Act"), Pub. L. No. 96-74, 93 Stat. 577, prohibited use of funds made available by the Act to carry out the 1978 and 1979 proposed revenue procedures. The Ashbrook Amendment, Section 103 of the 1980 Appropriations Act, 93 Stat. 562, specified that the funds appropriated could not be used "to formulate or carry out any * * * procedure, guideline * * * or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

The House Report on the 1980 Appropriations Act summarizes the Committee's misgivings concerning the proposed 1978 and 1979 revenue procedures:

> This Committee * * * is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. *The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service revenue procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of schools is a matter of far-reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit.* The Appropriations Committee is *unsure* that the proposed revenue procedures issued by the Service are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them and make the determination that the proposed revenue procedures are a proper expression of the tax laws.

H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 14-15 (1979) (emphasis supplied). Thus, the Report eschews any definitive conclusion with regard to the Service's authority, stating that the Committee is "unsure" whether the 1978 and 1979 procedures accord with legislative intent. The Report also counsels that action be taken by the Service in the area of tax exemptions for private schools "only when the legislative intent is fairly explicit."[24] Moreover, the sponsors of the amendments in both the House and Senate indicated their belief that the Service lacks statutory authority to deny tax exemptions to racially discriminatory schools[25] and that the appropriations limi-

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[24] That the Ashbrook and Dornan Amendments suspended only those revenue procedures promulgated after August 1978 in no way indicates congressional approval of the Service's pre-August 1978 policies.

[25] Congressman Ashbrook, in discussing his amendment on the House floor, stated:

> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it

tations were necessary to allow Congress time to act in the area.[26]

In passing the Ashbrook and Dornan Amendments, Congress called a halt to the Service's effort to establish stricter and more detailed procedures for implementing its 1970 policy of denying tax-exempt status to schools which discriminate on the basis of race.[27] The debates

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is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status.

* * * * *

For an agency to permit itself to be guided by pressures of pending legal action, other Federal agencies, outside pressure groups, or changes in an administration is to confuse its own role as tax collector with that of legislator, jurist, or policy-maker. [125 Cong. Rec. H5879-H5880 (daily ed. July 13, 1979).]

Senator Helms, sponsor of the Ashbrook Amendment in the Senate, was even more explicit, stating:

Mr. President, the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax-exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purpose as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both 'charitable' as well as meet their requirements of one of the other listed purposes. [125 Cong. Rec. S11835 (daily ed. Sept. 5, 1979).]

See also 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (remarks of Congressman Dornan).

[26] In introducing the Ashbrook Amendment in the Senate, Senator Helms stated: "My amendment is necessary to allow Congress the time to consider the numerous legislative proposals which have been introduced to deal with this problem." 125 Cong. Rec. S11980 (daily ed. Sept. 6, 1979); see 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (remarks of Congressman Dornan).

[27] The Ashbrook and Dornan Amendments have been extended in subsequent fiscal years. In the Appropriations Act for fiscal 1982 the Ashbrook Amendment was extended with the addition of lan-

on these amendments, however, provide little assistance in divining Congress' view concerning the proper interpretation of Section 501(c)(3). Some legislators, including the Amendments' sponsors, expressed the view that the Service lacks statutory authority to deny tax exemptions to educational organizations such as petitioners, while others expressed the opposite view.[28]

Even if a clear congressional consensus regarding the proper interpretation of Section 501(c)(3) emerged from a reading of the debates on the Ashbrook and Dornan Amendments, little insight into the legislative intent of Section 501(c)(3) would be gained. It is well settled that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *Price*, 361 U.S. 304, 313 (1960); *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). This point was underscored in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). There, the Court rejected a statutory construction based on "subsequent legislative history," noting that the

> post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Con-

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guage which prohibits use of appropriations to carry out any court order which would cause the loss of tax-exempt status unless in effect prior to August 22, 1978. 127 Cong. Rec. H5392, H5395 (daily ed. July 30, 1981).

[28] Compare 125 Cong. Rec. H5981 (daily ed. July 16, 1979) (Congressman Philip M. Crane); *id.* at H5982 (daily ed. July 16, 1979) (Congressman Goldwater); *id.* at H5884 (daily ed. July 13, 1979) (Congressman Grassley); *id.* H5885 (daily ed. July 13, 1979) (Congressman Duncan); *id.* at S11837 (daily ed. Sept. 5, 1979) (Senator Thurmond); *id.* at S11852 (daily ed. Sept. 5, 1979) (Senator Stennis) with *id.* at H5982 (daily ed. July 16, 1979) (Congressman Miller); *id.* at S11984 (daily ed. Sept. 6, 1979) (Congressman Schmitt); *id.* at S11833 (daily ed. Sept. 5, 1979) (Senator Javits); *id.* at S11835 (daily ed. Sept. 5, 1979) (Senator Metzenbaum); *id.* at S11851 (daily ed. Sept. 5, 1979) (Senator Levin).

> gress expressed before the Act's passage. * * * Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act.' [*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974), quoting *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 639 n.34 (1967).]

Accord, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979), quoting *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); see also *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980).

b. Nor do the instant cases come within the familiar rule of statutory construction that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co.* v. *FTC*, 395 U.S. 367, 380-381 (1969). In *Red Lion*, this Court rejected a radio broadcaster's contention that the FCC's "fairness doctrine," which requires that public issues be broadcast and that opposing viewpoints on those issues be given fair coverage, was without statutory authorization in the Communications Act. Although the FCC had been applying the fairness doctrine since 1929 under dubious statutory authority, the Act was amended in 1959 to "make[] it very plain that * * * the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues." *Id.* at 380. Thus, through subsequent "positive legislation" (*id.* at 382), Congress "ratified" (*id.* at 381) the FCC's longstanding administrative construction of the Act.

Here, Congress has enacted no such subsequent legislation. The pertinent language of Section 501(c)(3) has not been altered, amended, or in any respect modified since it was enacted in 1954. In 1976, Congress enacted Section 501(i) of the 1954 Code, which denies tax-exempt status to Section 501(c)(7) organizations—private social clubs and similar organizations—whose charter or other written policy statements provide for "discrimination

against any person on the basis of race, color, or religion." 26 U.S.C. 501(i). The 1976 statute is by its terms confined to Section 501(c)(7) organizations and, therefore, provides no guidance as to the meaning of the terms "charitable," "educational," and "religious" in Section 501(c)(3). Indeed, the only mention of Section 501(c)(3) organizations in any part of the 1976 statute or its legislative history is contained in a single footnote to the accompanying committee reports of both Houses.[29] This single footnote reference to Section 501(c)(3) in no way indicates approval of or acquiescence in the Service's 1970 policy, but merely acknowledges the district court's decision in *Green* v. *Connally*, *supra*, and this Court's summary affirmance thereof.[30]

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[29] Worded identically in both Reports, the pertinent portion of the footnote provides:

> Also, the Supreme Court has affirmed (*Coit v. Green*, 404 U.S. 997 (1971)) a decision (*Green v. Connally*, 330 F. Supp. 1150 (D.C., D.C. 1971)) that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2)). [S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976); H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).]

In floor debate on Section 501(i), there was no indication of congressional approval of the Service's policy regarding racially discriminatory private schools. Congressmen Ullman and Frenzel, who spoke in support of the bill, explained the nondiscrimination provision regarding private social clubs as "a new requirement" and a "major change in the tax law * * * with regard to social organizations." 122 Cong. Rec. 27452 (1976).

[30] Even if this singular footnote reference to Section 501(c)(3) organizations had clearly expressed approval of *Green*, it could not be read as an authoritative expression of congressional will. In *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980), this Court cautioned that "[a] mere statement in a conference report * * * as to what the Committee believes an earlier statute meant is obviously less weighty" than subsequent *legislation* interpreting an earlier statute. "Thus, * * * subsequent legislative history will rarely override a reasonable interpretation

Similarly, neither the Ashbrook Amendment nor the Dornan Amendment purports to alter, amend, or otherwise affect the definition of any statutory term in Section 501(c)(3). The amendments are negative in effect, refusing to fund certain proposed revenue procedures. Moreover, in acting on appropriations measures, legislators are entitled to assume that the funds appropriated will be used lawfully without foreclosing a later finding—congressional or judicial—that the agency funded has in fact been acting unlawfully. As this Court noted in *TVA v. Hill*, 437 U.S. 153, 190-191 (1978), "[w]ithout such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation." Accordingly, the Ashbrook and Dornan Amendments afford no basis for ascribing to Congress an intent contrary to that reflected in the plain language and legislative history of Section 501(c)(3).

A similar question of statutory construction was involved in *SEC v. Sloan*, 436 U.S. 103 (1978), which involved a reenactment in 1964 of Section 12(k) of the

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of a statute that can be gleaned from its language and legislative history prior to its enactment." *Ibid.*

The Court in *GTE Sylvania*, accordingly, gave no weight to statements contained in a conference committee report because the legislation which was the subject of the report did not deal with the issue discussed in the statements in question, because the interpretation espoused by the conferees was not mentioned by the committee that drafted the amending act, and because the interpretation espoused in the report was not debated on the floor of Congress. Similarly, here, the 1976 enactment of Section 501(i) did not purport to interpret Section 501(c)(3) and, indeed, concerned Section 501(c)(7) organizations only. The Senate and House Reports use virtually identical language, which suggests the absence of independent consideration of the proper scope of Section 501(c)(3), and the footnote reference to *Green* (again, assuming *arguendo* that it expressed approval of *Green*) was not debated on the floor of Congress. Thus the conclusion of the Court in *GTE Sylvania* applies equally here: "the statement of the Conference Committee is far from authoritative as an expression of congressional will * * *." 447 U.S. at 120.

Securities Exchange Act of 1934, 15 U.S.C. 78l(k).[20] In the Senate committee report accompanying the 1964 legislation, the Commission's interpretation of Section 12(k) was endorsed.[21] The Court rejected the argument that this later expression of congressional intent should prevail over the plain, and contrary, meaning of the statute, declaring (436 U.S. at 121):

> Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of § 12(k). On this point the present case differs significantly from *United States v. Correll*, [389 U.S. 299, 304 (1967)] where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that 'to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position * * *;'

Like the statute at issue in *Sloan*, the meaning of Section 501(c)(3) is clear from its language. Indeed, the instant cases present much less compelling reasons than those in *Sloan* to construe subsequent legislative activity as indicative of a particular statutory interpretation. As previously discussed, the congressional activity relating to the 1976 enactment of Section 501(i) and to passage of the Ashbrook and Dornan Amendments generated no committee report or other meaningful legislative expres-

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[20] Section 12(k) permits the SEC "summarily to suspend trading in any security * * * for a period not exceeding ten days" under certain specified circumstances.

[21] The Senate committee report stated:

> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. [S. Rep. No. 379, 88th Cong., 1st Sess. 66 (1963).]

sion endorsing or otherwise approving of the interpretation given Section 501(c)(3) by the district court in *Green* and adopted by the Service."

c. There remains only the question whether, notwithstanding the foregoing discussion, the Service's practice since 1970 of denying tax-exempt status to petitioners and other racially discriminatory private schools should be regarded as authorized by Section 501(c)(3) on the ground that Congress has allowed it to continue for some eleven years. Such a proposition arguably follows from the principle of statutory construction, noted in *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 381, that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."

This principle has in practice been invoked by the courts with great care, since its logic would make an administrative construction unassailable in a very few years so long as Congress remains silent. In *Red Lion* itself, "the Congress ha[d] not just kept its silence by refusing to overturn the administrative construction, but ha[d] ratified it with positive legislation." 395 U.S. at 381-382. And in *Zemel v. Rusk*, 381 U.S. 1 (1965), which is relied on in *Red Lion*, the administrative construction in

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"Shortly after the Service announced its new position with regard to the tax-exempt status of racially discriminatory schools, the Commissioner appeared to testify before the Senate Select Committee on Equal Educational Opportunity. The Commissioner explained the Service's new policy and proposed modes of enforcement. The Chairman of the Select Committee urged him to monitor attendance records rather than to accept a private school's assurance of a nondiscriminatory admissions policy. *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess. 1992-2028 (1970). This colloquy amounted to no more than a reiteration of the Service's recent policy and an expression of approval by an individual Senator. No legislation pertaining to the tax laws was proposed or considered.

question was uninterrupted for 26 years, and the Congress had not merely "refuse[d] to overturn the administrative construction," but had reenacted the legislation without change. *Id.* at 12.

Subsequent cases have also emphasized that a long-standing administrative interpretation is particularly persuasive when Congress has reenacted or otherwise "revisited" the pertinent legislation without changing it. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

Recently, however, the Court rejected the argument that the Securities Exchange Commission's interpretation of the Securities Exchange Act of 1934 should be adopted where "Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted * * * and on each occasion Congress left the administrative interpretation undisturbed." *Aaron* v. *SEC*, 446 U.S. 680, 694 n.11 (1980). As the Court explained (*ibid.*):

> [S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history.

Similarly, although Section 501(c)(3) has been amended since 1970,[*] the Service's policy regarding the tax-exempt status of discriminatory private schools was

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[*] In 1976 Congress amended Section 501(c)(3) to confer tax-exempt status upon organizations devoted to fostering national or international sports competition. See Pub. L. No. 94-455, Section 1313(a), 90 Stat. 1730.

not directly addressed by Congress. And, while the *Green* court's decision was acknowledged in congressional reports accompanying enactment of Section 501(i) in 1976, that legislation was concerned solely with the tax treatment of private social clubs. Nor was discussion of the Service's 1970 revenue ruling in connection with the Ashbrook and Dornan Amendments equivalent to a failure to alter administrative construction. As noted above, when voting on appropriations measures, legislators are entitled to operate under the assumption that the agencies funded are operating within the law. *See TVA v. Hill*, 437 U.S. 153, 190 (1978).

Thus, as in *Aaron*, the failure of Congress to act on the Service's 1970 revenue ruling falls far short of supporting a construction of Section 501(c)(8) "so clearly at odds with its plain meaning and legislative history." This point bears emphasis, for even where the agency's statutory construction has been consistent and longstanding, and even where Congress, having been informed of the agency's construction, has reenacted the statute without overturning that construction, the courts will reject an agency interpretation unsupported by the language of the statute and its legislative history. *SEC v. Sloan*, *supra*, 436 U.S. at 119-120, 122-123.

Indeed, *Sloan* involved an agency construction which had stood consistently for 34 years, during which time the statute had been reenacted with a legislative history indicating approval of the agency construction. 436 U.S. at 117. In contrast, the Service's construction of Section 501(c)(8) regarding discriminatory schools has stood for only 11 years and represents a litigation-inspired reversal of the agency interpretation given the statute for more than a half century preceding 1970. Moreover, here there has been neither statutory reenactment nor a process of amendment which focused congressional attention on the Service's construction without changing it. In

these circumstances, congressional silence cannot override the intent reflected in plain statutory language."

5. There are two final points to be made. In affirming the Service's authority to deny tax-exempt status to

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* This conclusion is in no way altered by the fact that several bills have been introduced in Congress, seeking in a variety of ways to legislate with regard to the tax-exempt status of private schools. None of the bills reached the floor of either House of Congress. More importantly, the courts have accorded this type of evidence of congressional inaction virtually no weight in the effort to illuminate the intent of an earlier Congress. See *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269 (1965).

This Court's decision in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), does not suggest otherwise. That case construed 42 U.S.C. 1981 to apply to private acts of racial discrimination, and based that interpretation on an earlier Court decision, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Subsequent to the *Jones* decision, Congress considered and rejected an amendment to the Equal Employment Opportunity Act of 1970 which would have repealed the interpretation accorded the statute in *Jones* insofar as it gave private sector employees a right of action based on racial discrimination in employment. In light of this "indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination" (427 U.S. at 175 (emphasis in original)), the Court found "no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes." *Ibid.* (emphasis supplied). Here, however, the doctrine of *stare decisis* is inapplicable, for "[t]he question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review in this Court * * *." *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 740 n.11.

Moreover, the extent to which the *Runyon* Court relied upon this congressional inaction in deciding the case is unclear. Presumably the Court did not give that factor much weight since "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n.11 (1969); see also *United States* v. *Wise*, *supra*, 370 U.S. at 411; *Waterman Steamship Corp.* v. *United States*, *supra*, 381 U.S. at 269. In any event, *Runyon* is distinguishable from the situation with regard to Section 501(c)(3) because no legislation which would have disapproved of or overruled the interpretation given to Section 501(c)(3) by the *Green* court and by the Service in 1970 has ever been considered on the floor of either House of Congress.

petitioners, the court of appeals hinted in *Bob Jones University* that its interpretation of Section 501(c)(8) was guided, at least in part, by equal protection considerations. Citing *Norwood* v. *Harrison*, 413 U.S. 455 (1978), the court stated (81-3 Pet. App. A11 n.7): "The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race." " " [G]overnment must 'steer clear' of affording significant tax support to educational institutions that practice racial discrimination."

To the extent that the court of appeals was suggesting that the granting of a tax exemption to these schools would be constitutionally impermissible under the Fifth Amendment, we strongly disagree. A facially neutral statute affronts equal protection norms protecting against racial discrimination only if its enactment or operation can be said to have been animated by a discriminatory purpose. E.g., *Washington* v. *Davis*, 426 U.S. 229, 239-244 (1976); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979).[36] Such is plainly not the case with regard to Section 501(c)(8). Nothing in its language or legislative history suggests a congressional purpose to afford tax-exempt status to educational organizations in order to foster racial discrimination by private schools.[37]

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[36] *Norwood* v. *Harrison*, *supra*, is not to the contrary, having arisen in the context of state and municipal programs in Mississippi that "benefitted private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 163 (1978). See also *Gilmore* v. *Montgomery*, 417 U.S. 556, 568, 570-571 n.10 (1974). To the extent that the Court's decision in *Norwood* can be read to reject the proposition that discriminatory purpose is a necessary element of a constitutional violation, it should be noted that *Norwood* was decided prior to the Court's ruling in *Washington* v. *Davis*, *supra*, which held unequivocally to the contrary.

[37] Commentators have suggested that if tax exemptions were deemed to impose constitutional obligations on the recipient, no one would be immune, since, for example, individual taxpayers receive "subsidies" in the form of interest deductions, charitable

Nor does the tax exemption conferred by Section 501(c)(3) make the government a partner or joint venturer in petitioners' enterprises. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177 (1972); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

Moreover, *Norwood* condemned material state resources provided to segregated private schools. The existence of a tax exemption for certain organizations is simply not the same kind of material support. Rather, it is a decision by Congress to refrain from collecting taxes from certain classes of organizations, including all *bona fide* educational ones. See *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970). The policies of an organization do not change its basic character. Indeed, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), Congress considered the danger of the federal government's involvement in the kind of activity at issue in *Norwood* and forbade it from doing so. But in taking such action, Congress gave no indication that it was thereby limiting the entitlement of educational institutions to tax exemptions.

Although some have contended that Title VI itself should be interpreted to achieve this result, the language of Title VI—which prohibits racial discrimination in any program or activity receiving "Federal financial assistance"—and its legislative history render unpersuasive the contention that tax exemptions constitute federal financial assistance under Title VI. Congress defined "Federal financial assistance" in the statute as "assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty." 42 U.S.C. 2000d-1. The Department of Justice's interpretative regulations are to the same effect. 28 C.F.R. 42.102(c). Nowhere in the statute is there an

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contribution deductions, and medical expense deductions, while corporations receive a surtax exemption. Bittker and Kaufman, *supra*, 82 Yale L.J. at 68-74. "[T]he Internal Revenue Code is a pudding with plums for everyone." *Ibid.*

indication that Congress intended tax exemptions to be among the particular types of assistance enumerated. Nor is there any mention in its legislative history of the possibility that tax exemptions could be the basis for triggering federal coverage under Title VI.[38] Moreover, the proposition that income tax exemptions constitute "Federal financial assistance" is inconsistent with the overall structure of the Civil Rights Act of 1964.[39]

In light of the far-reaching implications of including federal tax exemptions within the meaning of "Federal financial assistance" under Title VI (see note 39, *supra*), and in the absence of any indication in the statute's language or legislative history that Congress considered tax

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[38] A list of covered federal programs prepared by the Deputy Attorney General in connection with hearings on Title VI does not include tax exemptions as triggering coverage, even though the list referred to such minor instances of federal financial assistance as payments to three counties in Minnesota from the national forest fund and payments to the National Board for Promotion of Rifle Practice. *Hearings on H.R. 7152 as amended by Subcomm. No. 5 Before the House Comm. on the Judiciary*, 88th Cong., 2d Sess., Pt. VI, 2773 (1964). See generally, Bittker and Kaufman, *supra*, 82 Yale L.J. at 83-84. "[I]f 'tax subsidies' were embraced by the statutory language [of Title VI], the legislators were unaware of that fact." *Id.* at 83.

[39] For example, Title II of the Act, relating to public accommodations, exempts from nondiscrimination requirements "an establishment located within a building * * * which is actually occupied by the proprietor of such establishment as his residence * * *." 42 U.S.C. 2000a(b)(1). However, if the proprietor claimed an investment tax credit on purchasing a new stove, and if such a tax subsidy were deemed "Federal financial assistance," the Title II exemption would be nullified. Similarly, under this conception of "Federal financial assistance" the exclusion of contracts of insurance and guaranty from coverage under Title VI would be cancelled if the contract recipient were a corporation which took advantage of the corporate surtax exemption. Bittker and Kaufman, *supra*, 82 Yale L.J. at 81.

exemptions to constitute federal financial assistance, such a construction of Title VI does not withstand scrutiny.[40]

II. SHOULD THE COURT DISAGREE WITH OUR VIEW THAT THE COMMISSIONER LACKED AUTHORITY TO DENY EXEMPTIONS TO PETITIONERS ON NATIONAL POLICY GROUNDS, THE EXERCISE OF SUCH AUTHORITY HERE DID NOT VIOLATE PETITIONERS' RIGHT TO FREE RELIGIOUS BELIEF AND EXERCISE UNDER THE FIRST AMENDMENT

If the Court agrees with the preceding argument, it need not reach petitioners' claims under the First Amendment. Assuming *arguendo* that the Court finds the Commissioner is in fact clothed with the requisite authority to

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[40] The reasoning of the three-judge federal district court in *McGlotten* v. *Connally*, 338 F. Supp. 448 (D.D.C. 1972), which equated tax exemptions with "Federal financial assistance," is unpersuasive. While conceding that neither the language, nor agency interpretations, nor legislative history of Title VI of the Civil Rights Act evidenced a congressional intent to include Section 501(c) tax exemptions within the ambit of federal financial assistance under Title VI, the district court insisted that the "plain purpose" of the statute to promote nondiscrimination should override its plain language in determining whether federal tax exemptions constituted federal financial assistance. 338 F. Supp. at 461. The nondiscrimination purpose of Title VI would be advanced, the district court concluded, if some tax exemptions were equated with a distribution of federal funds, property, or use of federal personnel, and were thus treated as federal financial assistance.

McGlotten contravenes the maxim that the plain language rather than the general purpose of a statute should govern its interpretation, absent contrary congressional direction. See, *e.g.*, *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975). In addition, the district court's equation of tax exemptions with the distribution of federal funds seems premised on the idea that the government is entitled to all property and earnings of private parties, and thus a failure of Congress to tax constitutes federal financial assistance. The Supreme Court rejected that concept in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), holding that a tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organization.

withdraw petitioners' exemptions, its action was not prohibited by the First Amendment.

Both Goldsboro Christian Schools (Br. 31-44) and Bob Jones University (Br. 23-34) contend that because their racially discriminatory practices are the outgrowth of sincere religious faith, the Religion Clauses of the First Amendment prohibit the government from denying them tax-exempt status. But, as the court of appeals correctly held (81-3 Pet. App. A13-A14; footnote omitted), "the government's rule would not prohibit [petitioner] from adhering to [their] policy. Abandonment of the policy would not prevent [petitioners] from teaching the Scriptural doctrine of nonmiscegenation. Nor is any individual student * * * forced to personally violate his beliefs; no student is forced to date or marry outside of his race." Moreover, the Service's policy, applied evenhandedly to sectarian and nonsectarian schools, avoids government entanglement in matters of church doctrine, and does not involve preference of one sect or doctrine over another. Hence, the court of appeals concluded that "[t]he nondiscrimination policy also passes muster under the Establishment Clause" (*id.* at A14).

Since all that is at issue here is tax-exempt status, rather than a governmental prohibition of any of petitioners' practices, analysis begins with the principle that, while exemption from nondiscriminatory application of generally applicable tax laws is a constitutionally permissible accommodation of charitable organizations including churches themselves (see *Walz* v. *Tax Commission*, *supra*), it presumably is not constitutionally required. Once such exemptions have been granted, however, very serious First Amendment problems would be presented by any attempt to differentiate among churches or other religious organizations on the basis of their beliefs or religious practices. A grave constitutional problem would be presented, for example, if an exemption were to be denied solely because of admissions practices in a seminary or because the tenets of a faith disqualify certain classes of persons from

eligibility for its clergy. Thus, in a news release issued nine days after its ruling with respect to private schools, the Service stated that "[s]electivity of students, as by a religious seminary, having no relation to racial discrimination, would not be inconsistent with the IRS statement of position" (81-3 J.A. A239).

On the other hand, some religious practices (even as part of a worship service), such as human sacrifice, may constitutionally be prohibited and, a fortiori, may constitutionally serve as a basis for denial of tax-exempt status. Here, we submit that there is no constitutional impediment to basing denial of tax-exempt status on petitioners' discriminatory practices (which involve commercial dealings with the public).

1. a. It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), governmental interference with the dissemination of religious ideas (see *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follett* v. *McCormick*, 321 U.S. 573 (1944)), or use of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). But as the Court has also noted, "neutral prohibitory or regulatory laws having secular aims" may impose certain "incidental burdens" on free exercise when "the burden on First Amendment values is * * * justifiable in terms of the Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

Thus, a person is not protected from every burden on the exercise of his religion resulting from the implementa-

tion of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 603; *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461-462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). In determining whether a particular statute is supported by a governmental interest that outweighs a free exercise claim, it is appropriate (*McDaniel* v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring in the judgment))

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise Clause of the First Amendment"); *Johnson* v. *Robison*, *supra*; *Gillette* v. *United States*, *supra*. However, "[t]o strike down without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *McCormick*, *supra*, 321 U.S. at 577-578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112

(1943); see *United States* v. *Lee*, *supra*, slip op. 6-7; *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606.[41]

Here, despite petitioners' claims to the contrary (81-1 Br. 36; 81-3 Br. 9), the Service's rulings do not place more than an indirect and limited burden upon any person's or any corporation's right to free religious belief or exercise. Petitioners do not seek on religious grounds to limit their student body to members of a particular sect or to those who espouse particular beliefs. Rather, the focus of the policies of petitioners' at issue here is on racially discriminatory practices, not on beliefs. In requiring that petitioners maintain racially nondiscriminatory policies as a prerequisite to tax-exempt status, the Service does not purport to interfere with their right to espouse or teach a doctrine against interracial marriage, or with any student's right to adhere to such a doctrine. See *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310, 321-322 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).[42] Indeed, as this Court has noted (*Runyon* v. *McCrary*, *supra*, 427 U.S. at 176), even if the right of parents to have their children educated in schools fostering a belief in racial discrimination is assumed to be protected by the First Amendment, the First Amendment does not protect a

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[41] We submit, for example, that the First Amendment would not immunize a church from the tax on unrelated business income (see Sections 511-513 of the 1954 Code) if the church believed that it was its religious duty to conduct a business in competition with a particular company. See particularly Sections 512(b)(14) and 7605(c) of the 1954 Code.

[42] Nor do the Service's actions implicate the interests of a church in maintaining the intimacy of its activities, as petitioner Bob Jones University urges (81-3 Br. 23-25). Petitioners offer to the public on a commercial basis educational services that compete with programs of instruction in other schools and colleges (81-3 Pet. App. A3; J.A. A88-A89). Hence, "'Their actual and potential constituency * * * is more public than private.'" *Runyon* v. *McCrary*, 427 U.S. 160, 172, n.10 (1976) (quoting 515 F.2d 1082, 1089 (4th Cir. 1975)).

school's practice of racial discrimination. See also *Bob Jones University v. Johnson*, 396 F. Supp. 597, 606-608 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

b. *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, *supra*, upon which petitioners rely (81-1 Br. 33-34; 81-2 Br. 23 *et seq.*), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome than here. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in *Sherbert* was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in *Thomas* v. *Review Board, Indiana Employment Security Division*, 450 U.S. 707 (1981), in which the petitioner terminated his employment when he was assigned to armament production. Petitioners face no similar choice here.

Similarly, in *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal education requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly

influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in *Yoder* thus was either to risk losing their children from their faith or to violate the law. No such choice need be made here. Although petitioners claim that their discriminatory practices are the product of religious belief, they are free to continue to maintain their racial restrictions and relinquish their claim to tax exemption and deductible charitable contributions. Alternatively, petitioners can eliminate their racially restrictive admissions policies and other rules but continue to teach their religious belief in the separation of races. Unlike *Sherbert* and *Yoder*, the Service's policy therefore does not threaten the integrity of petitioners' religious beliefs or observances. See also *McDaniel* v. *Paty*, *supra*; *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

2. Finally, the court of appeals correctly held (81-3 Pet. App. A15-A16) that the Service's policy did not transgress Establishment Clause values because it avoids excessive entanglement with religion by applying its policy to all religiously operated schools (as well as non-religious schools). Thus, contrary to petitioner Bob Jones University's contention (81-3 Br. 32), the Service's policy does not have "the effect of creating a religious preference" and "official hostility toward non-preferred religions."

In enforcing its ruling, the only inquiry that the Service uniformly undertakes is the relatively narrow inquiry whether the school maintains racially nondiscriminatory policies. Such an inquiry does not involve the government in preferring one religion over another, or even concerning itself with whether racial discrimination is motivated by religious belief. All private schools must demonstrate compliance with the nondiscrimination principle. Hence, the Service's policy does not violate the Establishment Clause. As the court of appeals pointed out (81-3 Pet. App. A15-A16), "the principle of neutrality embodied in the Establishment Clause does not prevent government

from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." See *Gillette* v. *United States*, 401 U.S. 437, 454-458 (1971). "And, the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (81-3 Pet. App. A16; emphasis in original). Cf. *Brown* v. *Dade Christian Schools, Inc.*, *supra*, 556 F.2d at 323-324 (Goldberg, J., concurring); *Fiedler* v. *Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980); *Bob Jones University* v. *Johnson*, *supra*, 396 F. Supp. at 606.

Accordingly, the minimum intrusion occasioned by the Commissioner's nondiscrimination policy does not violate the Establishment Clause.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether non-profit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies or other racially discriminatory practices, qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, eligible to receive charitable contributions deductible by the donor under Section 170.

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Nonprofit private schools that, on the basis of religious doctrine, practice racial discrimination, do not qualify as tax-exempt organizations under the Internal Revenue Code 14

A. The Commissioner of Internal Revenue acted within his statutory authority in ruling that racially discriminatory private schools are not tax-exempt under Section 501(c)(3) and are therefore not eligible for charitable contributions deductible under Section 170 14

B. Congress intended to limit tax-exempt status under Section 501(c)(3) and eligibility to receive deductible charitable contributions under Section 170 to those organizations that are "charitable" at common law and therefore benefit society as a whole 18

C. A private school that practices racial discrimination does not qualify for tax exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170 because it is not organized and operated for "charitable" purposes as that term is understood at common law 25

D. Congress has repeatedly considered the Commissioner's statutory interpretation that racially discriminatory private schools are not tax exempt and has refused to alter it and, indeed, has made other statutory changes premised on the validity of that interpretation 38

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OPINIONS BELOW

No. 81-1. The order of the district court (Pet. App. 5a-18a) is reported at 436 F. Supp. 1314. The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

No. 81-3. The opinion and order of the district court dated December 26, 1978 (Pet. App. A38-A71) are reported at 468 F. Supp. 890. The opinion and order of the district court dated May 14, 1979 (Pet. App. A72-A86) are not reported. The opinion of the court of appeals (Pet. App. A1-A37) is reported at 639 F.2d 147.

JURISDICTION

No. 81-1. The judgment of the court of appeals (Pet. App. 53a) was entered on February 24, 1981, and the court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc on April 7, 1981 (Pet. App. 55a). The petition for a writ of certiorari was filed on July 2, 1981, and was

granted on October 13, 1981, to be consolidated with No. 81-3. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 81-3. The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on April 8, 1981 (Pet. App. A100-A101). The petition for a writ of certiorari was filed on July 1, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 170(a), 170(c), 501(a), 501(c)(3), 3121(b)(8)(B) and 3306(c)(8) of the Internal Revenue Code of 1954 (26 U.S.C.), and of Section 1.501(c)(3)-1(d) of the Treasury Regulations on Income Tax (26 C.F.R.) are set forth at Appendix, infra, 1a-5a.

STATEMENT

A. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. is a nonprofit organization incorporated in 1963 under the laws of North Carolina. Its articles of incorporation provide that its purpose is "to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * * " (Pet. App. 6a). _/ At least since 1969, petitioner has maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve (J.A. 6). During that period, petitioner has satisfied the requirements of North Carolina for secular

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_/ Unless otherwise indicated, "Pet. App." and J.A. references in this portion of the Statement are respectively to the appendix to the petition and record appendix in Goldsboro Christian Schools (No. 81-1).

education in private schools. _/ For the school year 1973-1974, petitioner enrolled approximately 750 students (Pet. App. 7a; J.A. 6-7). Submissions to the State indicate that petitioner requires its high school students to take one Bible-related course during each semester. The remaining course requirements and offerings, as reflected on those submissions, are indicative of secular subjects. Whether the subject of the course is secular or Bible-related, petitioner's practice is to begin each class with a prayer. This practice is in keeping with petitioner's overall purpose, and the desire of its founders, to provide a secular private school education in a religious setting (Pet. App. 6a-7a). _/ Petitioner does not require that its students profess any particular belief or subscribe to any particular belief. It does require, however, that its students adhere to certain standards of conduct that are consistent with the tenets of petitioner (J.A. 68). Thus, various religious denominations are represented in the student body (J.A. 69-70).

Based upon an interpretation of the Bible that it purports to follow, petitioner has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the

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_/ Pursuant to N.C. Gen. Stat. §115-255 (1978 repl.), the State of North Carolina regulates and supervises all nonpublic schools within the State serving children of secondary-school age, or younger, "to the end that all children shall become citizens who possess certain basic competencies necessary to properly discharge the responsibilities of American citizenship." In accordance with that statute, all such nonpublic schools --

> shall meet the State minimum standards as prescribed in the course of study, and the children therein shall be taught the branches of education which are taught to the children of corresponding age and grade in the public schools * * *.

_/ Athough the Second Baptist Church of Goldsboro was active in petitioner's founding and operation, petitioner was incorporated as a separate legal entity (Pet. App. 6a-7a; J.A. 5-6).

nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God" (J.A. 10). Although the policy would seem to require the exclusion of all noncaucasians, petitioner has accepted noncaucasians. Its policy in practice requires the exclusion only of members of the Negro race (Pet. App. 7a). Petitioner's president and principal believe that black students would be disinclined to abide by its tenets and practices because of the racial climate prevailing in the country and the pressures exerted by the positions of certain "militant" organizations (J.A. 81-93).

Petitioner has never received recognition from the Internal Revenue Service as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) On July 10, 1970, the Internal Revenue Service announced publicly that it could no longer justify its prior allowance of tax-exempt status to private schools maintaining racially discriminatory admissions policies, nor could it continue to treat gifts to such schools as charitable contributions that are deductible by the donor for income tax purposes (No. 81-3 - J.A. A235-236). _/ On audit, the Commissioner of Internal Revenue thereafter determined that petitioner did not qualify for exemption from federal social

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_/ As a result of its announced policy, which was formally published in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Internal Revenue Service did not appeal from the order of a three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), prohibiting the Commissioner from conferring tax-exempt status on private schools in Mississippi maintaining racially discriminatory admissions policies, and from allowing the deductibility of contributions to such schools as charitable contributions. The Green suit had been brought by a group of Mississippi parents and their children attending the public schools. In response to an appeal of the district court's order by intervenors seeking to vindicate their asserted First Amendment right to freedom of association, the government filed a motion to dismiss. No. 71-425. This Court, however, affirmed without opinion. Coit v. Green, 404 U.S. 997 (1971). See p. ___, n. ___, infra.

security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code. In 1974, the Commissioner accordingly assessed FICA and FUTA taxes against petitioner. After making partial payment, petitioner instituted this action in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 in federal withholding, FICA, and FUTA taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period (Pet. App. 5a, 7a-8a).

2. On the parties' cross motions for summary judgment, the district court ruled that the Internal Revenue Service had properly denied petitioner exempt status under Section 501(c)(3), and the tax benefits associated with qualification as a Section 501(c)(3) organization, because petitioner's racially discriminatory admissions policy violated the declared public policy of the United States (Pet. App. 14a). For purposes of adjudicating the motion, the court assumed that petitioner's racially discriminatory admissions policy was based upon a valid religious belief (Pet. App. 7a). It concluded, however, that denying petitioner the benefits of a Section 501(c)(3) tax exemption did not abridge any rights guaranteed petitioner under the Fifth Amendment to the Constitution or under the

Establishment or Free Exercise Clauses of the First Amendment (Pet. App. 12a-13a). /

The court of appeals affirmed, with one judge dissenting. Treating the case as "identical" to Bob Jones University, the court of appeals upheld the Internal Revenue Service's action on the authority of its decision in that case (Pet. App. 1a-3a). The court observed (Pet. App. 2a):

> It is rare that any two cases are identical twins. Nevertheless, as it happens, there is identity for present purposes between the instant case and the case of Bob Jones University * * * which has just been handed down. There the taxpayer was held not to be entitled to the §501(c)(3) exemption. In some respects, insofar as decision here is concerned, the resemblance of Goldsboro to Bob Jones University is stronger than would be the case the other way round. That is so since Goldsboro altogether prohibits admission of blacks. The University permits them to enter, but forbids certain interracial associations, especially dating and marriage.
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> The complete and impeccable treatment by Judge Hall in Bob Jones University makes it supererogatory for us to discuss the issue of tax exempt status under §501(c)(3). For that aspect we simply affirm the district court for the reasons advanced in the Bob Jones University case.

B. Bob Jones University - No. 81-3

1. Petitioner is a non-profit organization incorporated in 1952 under the laws of South Carolina. As set forth in its certificate of incorporation, its purpose is "'to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving

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/ During the pendency of the proceedings in the district court, the government agreed to abate all FUTA assessments against petitioner for periods ending on or before December 31, 1970, and to abate all FICA assessments against petitioner for periods ending before November 30, 1970 (J.A. 104, 111-112). The government made this concession because the Internal Revenue Service's announcement that it would no longer accord the benefits of tax exemption and deductibility of contributions to racially discriminatory private schools was effective as of November 30, 1970 (J.A. 104, 111-112). See Internal Revenue Code of 1954, Section 7805(b) (26 U.S.C.). The government accordingly stipulated that it was entitled to recover only $116,190.99 upon its counterclaim, and the district court entered judgment in its favor in that amount (J.A. 109-110, 115).

special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures * * *'" (Pet. App. A2-A3, A40-A41). _/ Petitioner enrolls students from kindergarten through college and graduate school (Pet. App. A3, A41; J.A. A63, A153, A211-A223). At the college level, it operates a school of education, a school of fine arts, a school of religion, a college of arts and sciences, and a school of business administration (J.A. A63, A127-128). In its graduate schools, it offers courses in art, music, speech, radio and television, cinema, religion, and education (J.A. A227). It enrolls more than 5,000 students and offers more than 50 accredited degrees in secular subjects (Pet. App. A3, A41; J.A. A63, A127-A128). Its various degrees (including its teaching degree which satisfied state law requirements) generally enable its graduates to qualify in the professional world on the same basis as graduates from other recognized educational institutions (J.A. A76, A88-A89, A269-A271). _/ Petitioner operates from fees for tuition, room, and

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_/ Unless otherwise indicated, "Pet. App." and J.A. references in this portion of the Statement are respectively to the appendix to the petition and the joint appendix in Bob Jones University (No. 81-3).

_/ Until 1972, the Veterans Administration recognized petitioner as an educational institution offering courses of study suitable for the education of veterans who were recipients of subsidies under the educational benefits program administered by the Veterans Administration. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600-601 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this period, petitioner's courses of study were certified to be suitable for the education of veterans by the South Carolina State Board of Education, using criteria prescribed by federal statute. Ibid. See 38 U.S.C. Sec. 1771 et seq. In November 1972, the Veterans Administration terminated the right of otherwise eligible veterans to receive veterans' benefits for education at Bob Jones University based upon a determination by the Veterans Administration that petitioner had failed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000d et seq.) and with the Veterans Administration regulations implementing the statutory requirement of nondiscrimination in federally assisted programs. See Bob Jones University v. Johnson, supra, 396 F. Supp. at 598-599. Upon petitioner's complaint for review, the district court and the court of appeals sustained the administrative order of termination. Bob Jones University v. Johnson, supra.

board. Gifts and contributions are allocated to expansion (Tr. 85).

Petitioner draws its student body from all over the United States and the world. As its 1975-1976 Catalog Bulletin stated, "One of the unusual features of Bob Jones University is that as a private liberal arts university it attracts its student body from practically all the states plus the District of Columbia, the outlying possessions of the United States, and more than a score of foreign countries" (J.A. A221). Petitioner engages in extensive recruiting activities to attract students (J.A. A77, A80-81, A85-A86, A89, A93-A94). It regards its function as "to serve the general public meeting their spiritual needs" (J.A. 75-76).

Petitioner also offers a separate nondegree, noncredit program entitled Institute of Christian Service, for persons who do not wish to undergo the rigors of academic pursuit (J.A. A75). The purpose of that program is to teach the principles of the Bible and to train Christian character (Pet. App. A3, A41). All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians. Students are screened as to their religious beliefs and their conduct is strictly regulated (Pet. App. A3-A4). However, more than 100 denominations are represented in the student body (J.A. 84).

From its inception, petitioner has, based upon religious doctrine, maintained a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. These policies were based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the scriptures (Pet. App. A43). Prior to 1971, petitioner excluded blacks entirely from enrollment. From 1971 until 1975, married black persons and members of other minority races or ethnic

groups were not excluded from enrollment, but petitioner continued to deny admission to unmarried blacks unless the applicant had been a staff member of petitioner for at least four years (Pet. App. A4, A43). See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this latter period, petitioner's doctrinal policy did not specifically require the exclusion of blacks, but denying admission to unmarried blacks was, in petitioner's judgment, the best means of implementing its prohibition against interracial dating and marriage _/ (Pet. App. A43, J.A. A71-A72, A81-A82, A250; A209-210, 212). _/

In response to the court of appeals' decisions in April and May 1975, in Bob Jones University v. Johnson, 529 F.2d 514 (4th Cir. 1975), and in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), petitioner once again revised its admissions policy (Pet. App. A4, A43-A44; J.A. A250-A253). After May 29, 1975, petitioner generally permitted unmarried

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_/ Petitioner's president explained the connection between its racially discriminatory admissions policy and interracial dating and marriage, in the following terms (A. 210):

> We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense -- stealing, attempted rape, or something of that sort -- he would cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed. The very attitude of the integrationist today makes it impossible for us to find any basis on which we can accept Negro students without violating Christian and Scriptural principles and without being put in a position where we could be harassed, annoyed, and threatened.

_/ "A." refers to the separately bound record appendix filed in the court of appeals, Nos. 79-1215 and 79-1216.

blacks as well as married blacks to enroll as students. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage (Pet. App. A4, A43-A44). _/ It also established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate petitioner's rules and prohibitions against interracial dating (Pet. App. A4, A44; J.A. A53-A54, A77-A80, A197-A198, A208-A209, A277). Petitioner required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions (Pet. App. A42-A43; J.A. A132-A133).

Until 1970, the Internal Revenue Service recognized petitioner as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On November 30, 1970, the Internal Revenue Service sent letters to approximately 5,000 organizations operating private schools, including petitioner, announcing that it would no longer recognize as legally entitled to tax exemption, or to receive deductible charitable contributions, any private school that maintained a racially discriminatory admissions policy (J.A. A232-A234). See Green v. Connally, 330 F. Supp. 1150, 1173 (D.D.C.), aff'd, 404 U.S. 997 (1971). The letter requested proof of a nondiscriminatory admissions policy and advised that tax-exempt ruling letters would be reviewed in light of the

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_/ Applicants to petitioner specified their race and marital status on their applications for admissions (J.A. A122-A133). If an application form indicated that an applicant was black, but did not reveal the race of the applicant's spouse, petitioner requested that additional information (J.A. A89-A90).

information provided. At the end of 1970, petitioner responded that it did not admit black students and, in September 1971, further stated that it had no intention of altering that policy. The Internal Revenue Service therefore commenced administrative proceedings leading to the revocation of petitioner's tax exemption. and of its advance assurance of deductibility. After petitioner's attempt to enjoin those proceedings had failed in this Court (see Bob Jones University v. Simon, 416 U.S. 735 (1974), _/ in January 1976, the Internal Revenue Service issued a final notice of revocation to petitioner, effective as of December 1, 1970 (Pet. App. A40, A87-A88, A89).

2. Seeking to reinstate its exemption, petitioner brought this action in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975 (Pet. App. A3, A40). _/ The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975 (ibid.). Following a trial, the district court held that petitioner qualified for tax exemption under Section 501(c)(3) of the Code as an institution organized and operated exclusively for religious and educational purposes, and that petitioner was not required to demonstrate a nondiscriminatory racial policy in order to so qualify (Pet. App.

_/ While the administrative proceedings preliminary to the revocation of its exemption were pending, petitioner sought injunctive relief to prevent the Internal Revenue Service from taking final action on the revocation. Bob Jones University v. Simon, supra, 416 U.S. 725. This Court unanimously held that the action was barred by the Anti-Injunction Act (26 U.S.C. (& Supp. III) 7421(a)) and by the Declaratory Judgment Act (28 U.S.C. (& Supp. III) 2201), but suggested (416 U.S. at 746) the refund suit procedure ultimately employed by petitioners here.

_/ Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. 3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

A45-A71). In a separate suit against the Secretary of the Treasury and the Commissioner of Internal Revenue instituted by petitioner, the district court thereafter ordered those officials to restore petitioner's tax exempt status and to publish advance assurances of deductibility of contributions to petitioner (Pet. App. A72-A86).

The court of appeals reversed (Pet. App. A1-A17), with one judge dissenting (Pet. App. A18-A37). _/ It rejected the district court's hypothesis that petitioner was entitled to tax exempt status because it is a "religious" institution and qualifies under the separately enumerated "religious" category of Section 501(c)(3). The court rejected "[t]his simplistic reading of the statute" as one that "tears section 501(c)(3) from its roots" (Pet. App. A7). Citing with approval the three-judge district court's decision in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, 404 U.S. 997 (1971), the court concluded that Section 501(c)(3) must be viewed against its background in the law of charitable trusts. Thus, the court of appeals agreed with the Green decision (330 F. Supp. at 1156-1160) that to be eligible for tax exempt status, "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy" (footnote omitted) (Pet. App. A7-A8; footnote omitted). It observed that "[t]his view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable'" (Pet. App. A7-A8, n.6). Here, it stated, petitioner's racial policies violated clearly defined public policy, rooted in the Constitution and the decisions of this Court condemning racial discrimination. Since there is a

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_/ The court of appeals stayed the district court's injunctive order pending appeal and consolidated both suits into a single appeal (Pet. App. A97-A99).

government policy against subsidizing racial discrimination in education, public or private, the court of appeals held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status * * *" (Pet. App. A10).

In so holding, the court rejected petitioner's argument that the application of the Service's nondiscrimination policy to petitioner violates the Free Exercise and Establishment Clauses of the First Amendment. Assuming that petitioner's racial discrimination is motivated by sincere religious beliefs, the court noted that the Internal Revenue Service's policy would not prohibit petitioner from adhering to its teachings or force any individual student to violate his beliefs (Pet. App. A13-A14). The court further concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the Commissioner of Internal Revenue acted within his statutory authority in determining that, because of their undisputed racially restrictive admissions policies and other discriminatory policies, petitioners failed to qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, or as eligible donees of charitable contributions deductible under Section 170(a) and (c)(2) of the Code.

a. Since 1970, the Internal Revenue Service Service has uniformly ruled that a private school will not qualify for those federal tax benefits unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis. That ruling, concurred in by the President at the time of its promulgation, and the decisions below upholding it, are amply supported by the Constitution, by decisions of this Court, and by Acts of Congress evidencing a strong national commitment to the eradication of racial discrimination generally, and, in particular, racial discrimination by educational institutions, public and private. See, e.g., Amendments XIII, XIV, XV; Runyon v. McCrary, 427 U.S. 160 (1976); Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981; Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. That commitment springs from the principle that "'[d]istinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). It reflects also the centrality of education to a democratic society and the peculiarly injurious effects of the stigma engendered by discrimination in the classroom. Brown v. Board of Education, 347 U.S. 483, 493-495 (1954); Bolling v.

Sharpe, 347 U.S. 497, 500 (1954). Indeed, this Court's opinion in Runyon v. McCrary, 427 U.S. 160 (1976), suggests that while petitioners may have a right to teach doctrines of racial separation, they cannot maintain racially discriminatory admissions policies and other similar practices if they are commercially operated and otherwise open to the general public. Such conduct violates 42 U.S.C. 1981, which provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens.

b. Given the highly articulated national policy against racially segregated education, the Commissioner of Internal Revenue was amply justified in concluding that petitioners were not "charitable" organizations within the meaning of Section 501(c)(3) or eligible for "charitable contributions" deductible under Section 170(c) of the Code. The origin, structure, and legislative history of those provisions demonstrate that Congress intended to grant the benefits of tax exemption and to permit deductibility of contributions only to those organizations whose operations are "charitable," as that term is used at common law. Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924); Helvering v. Bliss, 293 U.S. 144, 147 (1934). H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). As the sponsor of a predecessor to the current exemption provision explained, the exemption was designed to aid institutions devoted exclusively to the relief of suffering and to all things which commend themselves to every charitable and just impulse. 44 Cong. Rec. 4150 (1909). Accordingly, both the Internal Revenue Service and the courts have viewed the tax statutes against their background in the law of charitable trusts, and have properly ascribed primacy to the term "charitable" in the tax exemption provisions. This interpretation is supported by the 1959 revision of the the Treasury Regulations on Income Tax (1954

Code), Section 1.501(c)(3)-1(d)(2), as well as the language of Section 170(c)(2), which allows a deduction for "charitable contributions." Those Regulations have been extant during repeated congressional examination of the exempt organization provisions and particularly amendments to Section 501(c)(3). The Regulations are therefore an authoritative interpretation as to which Congress is deemed to have given its approval. See, e.g., Helvering v. Winmill, 305 U.S. 79, 82-83 (1938); Lykes v. United States, 343 U.S. 118, 127 (1952).

The Service has accordingly ruled that, since private schools which practice racial discrimination are not classified as charities under the law of charitable trusts and violate sharply defined public policies, they provide no public benefit warranting the granting of a tax exemption and eligibility for deductible "charitable contributions" under Section 170. Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. That position was first upheld in the seminal opinion of the three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), upon whose analysis we rely.

Apart from the decision below, the Green ruling has been followed in Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981). These decisions are in accord with rulings of this Court sustaining the disallowance of tax deductions that would frustrate sharply defined state or national policy. Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958); Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941). Indeed, since tax exemption and eligibility for deductible contributions constitute an indirect government subsidy in the form of matching grants, the Commissioner could well conclude, as did the three-judge district

court in Green v. Connally, supra, 330 F. Supp. at 1164, that conferring tax exempt status upon racially discriminatory private schools would pose serious constitutional problems that could be avoided by requiring nondiscrimination as a prerequisite to tax exemption. "Racial discrimination in state-operated schools is barred by the Constitution and "'[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'" Norwood v. Harrison, 413 U.S. 455, 465 (1973), quoting Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967).

c. Congress has repeatedly considered the Commissioner's statutory interpretation that racially discriminatory private schools are not tax exempt and has refused to alter it. Indeed, Congress has made other statutory changes based upon the validity of that interpretation.

Shortly after the Service announced its policy, the Commissioner testified before a Senate Committee which thoroughly explored the Service's policy and its enforcement. In 1976, Congress extended the nondiscrimination principle to the tax exempt status of social clubs by adding the provision now contained in Section 501(i) to the Code. In reporting the measure, both the Senate and the House Committee Reports cited with approval the three-judge district court's opinion in Green v. Connally, supra, for the proposition that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))."

Finally, the more recent enactment by Congress of the Ashbrook and Dornan Amendments further strengthens the case for congressional acquiescence in the Service's substantive legal position. For the legislative history shows that Congress, in

temporarily barring the employment of new procedures to enforce the policy of the Internal Revenue Service, intended to leave fully intact, and indeed to sanction, the existing nondiscrimination policy of the Service. In these circumstances, the Service's statutory interpretation should be upheld as conforming with Congress' intent. Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 248, 251 (1978). Moreover, during the last decade, numerous bills have sought to alter the Service's nondiscrimination principle, but none of them has been enacted. "There could hardly be a clearer indication of congressional agreement with the view [announced by the Commissioner's interpretation that racially discriminatory private schools are not tax-exempt under Section 501(c)(3))" Runyon v. McCrary, supra, 427 U.S. at 174-175; Joint Industries Board v. United States, 391 U.S. 224, 228-229 (1968).

2. Both Goldsboro Christian Schools and Bob Jones University seek to excuse their failure to satisfy the nondiscrimination principle on the ground that their discriminatory practices are the outgrowth of sincere religious faith. But as the court of appeals correctly concluded, the unquestioned First Amendment right to free religious belief and exercise does not carry with it a guarantee of any person's or corporation's entitlement to tax-exempt status. The Internal Revenue Service's ruling does not purport to interfere with petitioners' right to espouse and teach religious doctrine, or with the right of any student to adhere to such doctrine. Indeed, in a press release issued nine days after the ruling involving private schools, the Service specifically indicated that its position did not affect selectivity of students by a religious seminary. By requiring them to demonstrate racially nondiscriminatory policies as a condition to receiving federal

tax exemption and eligibility for charitable contributions, the Internal Revenue Service did not encroach on any activity to which this Court has accorded affirmative constitutional protections. See Norwood v. Harrison, 413 U.S. 455, 464 n.7, 468-470; Runyan v. McCrary, 427 U.S. 160, 175-179 (1976). Hence, the Service's ruling does not violate the Free Exercise Clause of the First Amendment.

Nor does the nondiscrimination principle of the Internal Revenue Service transgress values under the Establishment Clause. As the court below properly observed (No. 81-3 Pet. App. A15-A16), "the uniform application of the rule to all religiously operated schools [as well as nonreligious schools] avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief (emphasis supplied)." Hence, the Service's policy does not prefer one religion over another or provoke entanglement in matters of church doctrine that would implicate the Establishment Clause.

ARGUMENT

NONPROFIT PRIVATE SCHOOLS THAT, ON THE BASIS OF RELIGIOUS DOCTRINE, PRACTICE RACIAL DISCRIMINATION, DO NOT QUALIFY AS TAX-EXEMPT ORGANIZATIONS UNDER THE INTERNAL REVENUE CODE

A. The Commissioner of Internal Revenue acted within his statutory authority in ruling that racially discriminatory private schools are not tax-exempt under Section 501(c)(3) and are therefore not eligible for charitable contributions deductible under Section 170

1. These consolidated cases present an important question with respect to the Internal Revenue Service's statutory authority to administer the law governing the tax-exempt status of private schools. As this Court observed in an earlier procedural chapter of this litigation involving petitioner Bob Jones University, an organization's receipt of tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and its consequent inclusion in the Internal Revenue Service's Cumulative List of Organizations described in Section 170(c) "assures potential donors in advance that contributions to the organization will qualify as charitable deductions under §170(c)(2)," Bob Jones University v. Simon, 416 U.S. 725, 729 (1974). Because the Service generally permits a donor to rely on the Cumulative List, "appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations" (id. at 729-730).

Tax-exempt status under Section 501(c)(3) and eligibility for tax deductible charitable contributions constitute a substantial financial benefit and form of indirect government support. To begin with, such status confers exemption from income taxes on net income, the federal social security taxes (26 U.S.C. 3121(b)(8)(B)), and the federal unemployment taxes (26 U.S.C. 3306(c)(8)). But more importantly, an organization's tax-

exempt status permits donors to reduce their tax liability by means of charitable contributions to the organization. Thus, the net cost of every dollar given to a Section 501(c)(3) organization by a donor in the 50% marginal tax bracket is only 50 cents. In real economic terms, the ability of such a donor to make a $1 contribution at a net cost of 50 cents therefore represents a form of indirect government support or "contribution" of 50 cents to the donee organization.

Thus, the tax laws make the government a partner in the multiple forms of private philanthropy that abound in the Nation. _/ And such charitable pluralism is widely regarded as a healthy phenomenon providing important benefits to society as a whole. _/ Private philanthropy can accomplish tasks that are unsuited for the government to perform. But not all forms of private philanthropy are eligible for tax benefits. As we shall show in greater detail, the basis for conferring tax exemptions and benefits upon such private philanthropy was Congress' belief that "the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare" H.R. Rep. No. 1860, 75th Cong., 3d Sess., p. 19 (1938).

Tax exemption under Section 501(c)(3) and eligibility for deductible contributions under Section 170 therefore rest on the sound congressional policy that a qualifying organization must

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_/ Of course, this does not mean that the tax-exempt institutions become arms of the government subject to the constitutional strictures on governmental action. See Walz v. Tax Commission, 397 U.S. 664, 675-677 (1970).

_/ See Green v. Connally, 330 F. Supp. 1150, 1162-1163 (D.D.C. 1971), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971); Saks, The Role of Philanthropy: An Institutional View, 46 Va. L. Rev. 516, 524 (1960); Stone, Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy, 1968 S. Calif. Tax Inst. 2-7.

promote the general welfare. This limitation, as we shall show, is consistent with the law of charitable trusts, that a "charitable" trust is one formed to serve the general welfare and benefit the community at large. As this Court observed more than 100 years ago in Ould v. Washington Hospital for Foundlings, 95 U.S. 303, 311 (1877), "A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."

2. Here, petitioner Goldsboro Christian Schools concedes (Pet. 6) that it "has maintained a racially discriminatory admissions policy since its founding." It simply refuses to admit black students. Although petitioner Bob Jones University maintained a similar discriminatory admissions policy prior to 1971, and until May, 1975, refused to admit any black applicant who was not married, it now denies admission to any applicant known to be a partner in an interracial marriage, and enforces strict disciplinary rules against interracial dating (see pp. , supra). Thus, Bob Jones University imposes rules upon its student body based upon racial classifications.

Petitioners' racially restrictive policies, in offering services that they otherwise make commercially available to a large segment of the general public (see pp. ___, supra), _/ prevent their activities from satisfying the statutory criterion of promoting the general welfare and benefiting the community at large. They are accordingly not "charitable" organizations within the meaning of the federal tax laws. Indeed, if Goldsboro's discriminatory practices had been engaged in by a nonsectarian institution with no claim that its racial policies

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_/ Petitioners' broad-based student bodies and petitioner Bob Jones University's recruitment policies make it clear that these "schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private * * *" Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976), quoting from (515 F.2d 1082, 1089). Cf. id. at 188 (Powell, J., concurring).

were based on religious doctrine, it is settled that its exclusion of blacks would violate the equal right to contract provisions of Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981, and subject it to a cause of action under that federal statute. Runyon v. McCrary, 427 U.S. 160 (1976). Putting aside petitioner Bob Jones University's similar claim based on religious doctrine, its policy of denying admission to partners in an interracial marriage and of expelling students who date or marry outside their race likewise rests upon an invidious distinction drawn according to race that would violate 42 U.S.C. 1981, and render it liable to a similar suit. Tillman v. Wheaton Haven Recreational Association, 410 U.S. 431 (1973) (white club member has cause of action under 42 U.S.C. 1981 and 1982 for expulsion for bringing black guests); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975), cert. denied, 422 U.S. 1006 (1976) (white man denied employment because wife was black has cause of action under 42 U.S.C. 1981); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (42 U.S.C. 1981 prohibits commercially operated private sectarian school from expelling a white student because of her association with a black student). Cf. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-642 (1950) (rules and regulations applied by a state-supported university that "impair[ed] and inhibit[ed] [a black student's] ability to * * * engage in discussions and exchange views with other students * * * and "depriv[ed] [him] of the opportunity to secure acceptance by his fellow students on his own merits" held to violate right to equal protection). See also Loving v. Virginia, 388 U.S. 1 (1967) (law prohibiting interracial marriage held unconstitutional); McLaughlin v. Florida, 379 U.S. 184

(1964) (law prohibiting interracial cohabitation held unconstitutional). _/

3. In light of the federal statutory prohibitions and public policy against racial discrimination by private schools, the court of appeals correctly held that the Commissioner of Internal Revenue acted within his statutory authority in determining that petitioners did not qualify as tax-exempt organizations under Section 501(c)(3). As we shall show, qualification for tax-exempt status under that Section requires an organization to show that it is "charitable" as that term is understood at common law, i.e. that it benefits the community as a whole. We shall further show that educational institutions such as petitioners that engage in racially discriminatory practices do not so qualify, and that petitioners' First Amendment claims do not entitle them to tax-exempt status.

B. Congress intended to limit tax-exempt status under Section 501(c)(3) and eligibility to receive deductible charitable contributions under Section 170 to those organizations that are "charitable" at common law and therefore benefit society as a whole

1. Section 501(c)(3) of the Internal Revenue Code of 1954 (as in effect during the period relevant) exempted from income taxation--

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable,

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_/ Petitioner Bob Jones University's 1975 revision of its admissions and disciplinary rules rendered it no more eligible for the benefits of federal tax exemption. It did not then adopt "a completely open admissions policy * * *," as it asserts (Br. 3, n.2). On the contrary, it continued to deny admission to anyone who was a partner in an interracial marriage, who engaged in interracial dating, or who advocated, or belonged to a group that advocated, interracial dating or marriage (J.A. A53-A54, A208-A209). Accordingly, as the court of appeals correctly pointed out (81-3 Pet. App. A9-A10), petitioner's policy of denying admission to partners in an interracial marriage and of expelling students who date or marry outside of their race rests, as did its prior policies, upon an invidious distinction drawn according to race. See Loving v. Virginia, supra, McLaughlin v. Florida, supra. For present purposes, petitioner Bob Jones University's racial restrictions are therefore comparable to petitioner Goldsboro's absolute ban on the admission of blacks. Thus, the fact of petitioners' racially discriminatory policies is beyond dispute. Cf. Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981). Moreover, during part of the period in suit (1970-1975), petitioner Bob Jones University denied admission to all blacks, and then to unmarried blacks. See p. ___, supra.

> scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *.

Section 170(c)(2) of the Code provides a deduction for income tax purposes for a "charitable contribution" to a "corporation, trust, or community chest, fund, or foundation * * * organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *." See also Section 2055 (estate tax charitable deduction), 2522 (gift tax charitable deduction). Those provisions are construed in pari materia. Bob Jones University v. Simon, supra, 416 U.S. at 727-728 & n.1; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 29, n.1; (1976).

Since 1970, the Internal Revenue Service has consistently ruled that a private school, "whether church related or not," does not qualify as a tax-exempt organization under Section 501(c)(3), or as an eligible donee of charitable contributions deductible under Section 170(c)(2), unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis (81-3 J.A. A235-A239). / The decision to take such a position was made at the highest level of

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/ See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

the Executive Branch. On the same day that the Service announced its position (July 10, 1970), the White House Press Secretary issued the following statement: "The President approves of and concurs in the IRS decision regarding tax exemption for discriminatory private schools. He believes that ultimately the tax status of racially discriminatory private schools will be determined by the courts and that this is desirable." See Hearings Before the Select Senate Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., Part 3D-Desegregation Under Law, p. 1998 (1970).

As the Commissioner explained in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, "the statutory requirement of being 'organized and operated exclusively for religious, charitable * * * or educational purposes' was intended to express the basic common law concept" of charity. The primacy of the charitable requirement is further shown "by [Congress'] description in section 170(c) of the Code of a deductible gift to 'a corporation trust, fund, or foundation * * * organized and operated exclusively for * * * educational purposes' as a 'charitable contribution'" (1971-2 Cum. Bull. at 230). Since "all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy * * *" and there is "a national policy to discourage racial discrimination in education, whether public or private * * *," the Ruling holds that "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in section 170 and 501(c)(3) of the Code * * * and accordingly does not qualify as an organization exempt from Federal income tax" (id. at 230-231). /

2. The history of the tax exemption provisions supports the Commissioner's ruling position. It shows that in enacting the exemption for charitable organizations, Congress intended to benefit only those organizations whose operations are beneficial to society as a whole, i.e., "charitable," as that term was understood at common law. Section 501(c)(3) has its roots in Section 32, Act of August 27, 1894, 28 Stat. 556, and was carried

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/ See Restatement, Trusts (Second), Section 377, Comment c (1959): "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."

forward, unchanged in substance, into the Corporation Excise Tax Act of Aug. 5, 1909, 36 Stat. 113, Section 38. / In its initial version, the statute exempted from tax "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes * * *." That enumeration was in accord with Lord MacNaughten's authoritative collation of common law charities in Commissioners for Special Purpose of Income Tax v. Pemsel [1891] A.C. 531, 583 (quoted in Evans v. Newton, 382 U.S. 296, 307-308 (1966) (White, J., concurring)):

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

See also Jackson v. Phillips, 14 Allen (96 Mass.) 539, 556 (1867); IV Scott, The Law of Trusts (1967 ed.), Section 368. / Thus, the term "charitable" is used "in its generally accepted legal sense" (Treasury Regulations, Section 1.501(c)(3)-1(d)(2)), and not in the popular sense such as benevolence to the

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/ Earlier income taxes were originally imposed only upon individuals, Section 49, Act of Aug. 5, 1861, 12 Stat. 292, 309, and subsequently only upon individuals and certain specified corporations, Sections 116, 120-122, Act of June 30, 1864, 13 Stat. 218, 281, 283-285. Cf. Paul, Taxation in the United States 9-15 (1954). See Collector v. Hubbard, 12 Wall. 1 (1870).

/ The terms of the exemption have been continued without basic change in all subsequent income tax acts. The first modern income tax statute, Act of Oct. 3, 1913, c. 16, 38 Stat. 114, Section II(G)(a), contained an exemption in favor of "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." The Revenue Acts of 1916 and 1918 carried forward that exemption in identical terms. Section 11(a), Act of Sept. 8, 1916, 39 Stat. 756, Section 231(6), Revenue Act of 1918, 40 Stat. 1057. By Section 231 of the Revenue Act of 1921, 42 Stat. 227, Congress added to the statute the word "literary" and the phrase "or for the prevention of cruelty to children or animals." The phrase "testing for public safety" was inserted in 1954. And the Revenue Act of 1934, ch. 277, 48 Stat. 680, added the qualification that "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

The income deduction for charitable contributions originated in Section 1201(2), Act of Oct. 3, 1917, 40 Stat. 300. See Helvering v. Bliss, 293 U.S. 144, 147 (1943). It has been continued in each subsequent revenue enactment. See Reiling, Federal Taxation: What is a Charitable Organization?, 44 A.B.A.J. 525, (1958).

poor. Green v. Connally, supra, 330 F. Supp. at 1157; accord, Eastern Kentucky Welfare Rights Org v. Simon, 506 F.2d 1278, 1286-1290 (D.C. Cir. 1974), vacated and remanded on other grounds, 426 U.S. 26 (1976), see Reiling, Federal Taxation: What is a Charitable Organization, 44 A.B.A.J. 525, 527 (1958); cf. 4 Report of the Royal Commissioners on Taxation [Canada], p. 132 (1967).

The legislative history of the tax exemption provisions also indicates that Congress intended to limit their application to those organizations that further the traditional charitable objects of society as a whole and thereby diminish the burdens of government. As the sponsor of the 1909 tax exemption statute observed, the provision was designed to relieve from the corporate tax those institutions "devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse" (emphasis supplied). 44 Cong. Rec. 4150 (1909). Similarly, when Congress amended the provision for charitable deductions to confine its application to gifts made to domestic institutions (by Section 23(o), Revenue Act of 1938, ch. 289, 52 Stat. 447), the accompanying House Committee Report (H.R. Rep. No. 1860) 75th Cong., 3d Sess. 19 (1938), explained:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The United States derives no such benefits from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.

3. The decisions of this Court confirm the primacy of the "charitable" requirement under Section 501(c)(3). In Helvering v. Bliss, 293 U.S. 144, 147 (1934), the Court emphasized the

"charitable" requirement by observing that "Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income * * *" (emphasis supplied). Thus, the fact that the statute speaks of "corporations * * * organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes" does not, as petitioners would have it, mean that each one of those terms describes a mutually exclusive tax-exempt category. Instead, an organization is eligible for tax-exempt status under Section 501(c)(3) only if its operations are "charitable," i.e., of benefit to society as a whole. See Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924) ("* * * [e]vidently the exemption [was] made in recognition of the benefit which the public derives from corporate activities of the class named, and [was] intended to aid them when not conducted for private gain." Accord, St. Louis Union Trust Company v. United States, 374 F.2d 427, 432 (8th Cir. 1967). Otherwise, a school organized to train political assassins or terrorists or to teach genocide, an organization practicing a religion devoted to the illegal shipment of arms or practicing sacraments that constitute crimes such as human sacrifice, or a scientific organization devoted to the development and distribution of illegal drugs, each would be exempt from tax and eligible for deductible charitable contributions as respectively "educational," "religious," or "scientific" organizations. Congress surely never intended the government thus to provide indirect financial support for criminal activities or for organizations whose aims are contrary to clearly established public policy.

/ As the three judge district court in Green v. Connally, supra, 330 F. Supp. at 1160, put it: "This public policy doctrine operates as a necessary exception to or qualifier of the precept that in general trusts for education are considered to be for the benefit of the community. Otherwise, for example, Fagin's school for pickpockets would qualify for a charitable trust."

The courts of appeals have similarly viewed the tax exemption provisions as reflective of the common law of charitable trusts. See United States v. Proprietors of Social Law Library, 102 F.2d 481, 483 (1st Cir. 1939) ("[t]he term 'charitable' is a generic term and includes literary, religious, scientific and educational institutions"); Pennsylvania Co. for Insurance on Lives v. Helvering, 66 F.2d 284, 285 (D.C. Cir. 1933) ("we must look to established [trust] law to determine the meaning of the word charitable.'"). Cf. International Reform Federation v. District Unemployment Board, 131 F.2d 337 (D.C. Cir. 1942). _/

Finally, as the court below in Bob Jones University pointed out (No. 81-3 - Pet. App. A7-A8, n.6), the structure of the statutory framework itself supports the correctness of the Commissioner's ruling position that an organization seeking tax-exempt status under Section 501(c)(3) must show that it is "charitable," whatever the particular nature of its activities (educational, religious, scientific, etc.) might be. Thus, Section 170(a) and (c), the companion provision that confers an income tax deduction to donors to Section 501(c)(3) organizations, characterizes the deduction as for a "charitable contribution." Indeed, the language of Section 170(c)(2)(B), which defines in part the type of organization eligible for gifts of deductible "charitable contributions," tracks almost verbatim

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_/ In International Reform Federation, the District of Columbia Circuit stated (131 F.2d at 339):

> That Congress had in mind these broader definitions is confirmed by the words used in the [District of Columbia Code] for by its terms it embraces religious, charitable, scientific, literary, or educational corporations, thus including within the exemption clause every nonprofit organization designed and operating for the benefit and enlightenment of the community, the State, or the Nation--in short, to apply the exemption to those organizations commonly designated charitable in the law of trusts.

the text of Section 501(c)(3). In these circumstances, it is plain that the "charitable" requirement is the threshold test for qualification for tax exemption under Section 501(c)(3) and eligibility for deductible contributions under Section 170. /

C. A private school that practices racial discrimination does not qualify for tax exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170 because it is not organized and operated for "charitable" purposes as that term is understood at common law

1. As we have shown (supra, pp.), Congress intended that an organization seeking tax-exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions must be "charitable" in the broad common law sense of that term, i.e., it must benefit society as a whole. The court below correctly concluded that a private school, otherwise open to a large segment of the general public, that maintains a racially discriminatory admissions policy or other racially restrictive practices, is not beneficial to the community at large and is therefore not "charitable" as that term is understood at common law.

This proposition follows from the fundamental principle of the law of trusts that all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy. Ould v. Washington Hospital for Foundlings, supra, 95 U.S. 303; Restatement, Trusts (Second), Section 377, Comment c (1959).

/ See also Sections 545(b)(2), 556(b)(2), 873(b)(2), 882(c)(1)(B), all of which use the term "charitable contribution." Section 642(c) confers a deduction to an estate or trust for "Amounts Paid or Permanently Set Aside for a Charitable Purpose." Cf. Sections 501(h) and 4911, which impose a tax on the lobbying expenditures of certain "public charities," and which place under that heading educational institutions, hospitals, and medical research organizations, among other organizations described in Section 501(c)(3).

Accordingly, the development of a clearly articulated public policy against racial discrimination in education has led to a corresponding change in the law governing enforcement of racially restrict provisions in educational trusts. After reviewing the common law decisions dealing with trusts established for the purpose of providing for racially discriminatory private education, the three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), concluded that "The cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities (footnote omitted)" (id. at 1160). Thus, the district court in Green pointed out that numerous decisions have thwarted enforcement of racially discriminatory bequests in private education by removing racial restrictions from trust instruments under the cy pres doctrine. See, e.g., Bank of Delaware v. Buckson, 255 A.2d 710, 717 (Del. Ch. 1969) (scholarships); Dunbar v. Board of Trustees of George W. Clayton College, 461 P.2d 28 (Colo. 1969) (orphanage); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969) (trust for aged "white men"); cf. Coffee v. William Marsh Rice University, 408 S.W.2d 269 (Tex. Civ. App. 1966) (nullifying racial restrictions in university charter). See also Howard Savings Institution v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); In re Estate of Hawley, 32 Misc. 2d 624, 223 N.Y.S. 2d 803 (1961).

In these circumstances, it was well within the statutory authority of the Commissioner of Internal Revenue to conclude that a private school that practices racial discrimination either in its admissions policy or in its other governing rules cannot qualify for tax exempt status under Section 501(c)(3). Tax exemption under Section 501(c)(3) requires organization and operation for "charitable" purposes as that term is understood at common law. Thus, once the common law courts developed a body of

decisional law that refused to enforce racially discriminatory bequests and trusts in the context of private education, the Commissioner of Internal Revenue had ample legal basis to exercise his authority to "prescribe all needful rules and regulations" (26 U.S.C. 7805(a)) to rule that racially discriminatory private schools were not tax-exempt under Section 501(c)(3).

Indeed, the Commissioner's ruling in 1970 was presaged by the 1959 revision (24 Fed. Reg. 5217,5219) of the Treasury Regulations under Section 501(c)(3). In promulgating Section 1.501(c)(3)-1(d)(2) of those Regulations, pursuant to its authority to "prescribe all needful rules and regulations" (26 U.S.C. 7805(a)), the Treasury recognized that the term "charitable" is "'so general * * * as to render an interpretative regulation appropriate.'" National Muffler Dealers Assn. v. United States, 440 U.S. 472, 476 (1979), quoting Helvering v. Reynolds Co., 306 U.S. 110, 114 (1939). See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 29 (1976). Thus, the Regulations provide in pertinent part:

> (2) Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501 (c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works, lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. * * *

Hence, since at least 1959, the Treasury has explicitly reaffirmed Congress' intention to confer tax-exempt status under Section 501(c)(3) on those organizations that are "charitable" in

the common law sense of that term. _/ This construction of the statute has resulted in a series of published rulings that have relied upon the law of charitable trusts in determining whether an organization is exempt from tax and eligible for deductible charitable contributions under Sections 501(c)(3) and

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_/ Petitioners point out (81-1 Br. 20-25; 81-3 Br. 14-16) that in prior Regulations under Section 501(c)(3) and its predecessors, and in certain rulings, no longer followed, the Internal Revenue Service took the position that "[c]orporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor." Treasury Regulations 118, Section 39.101(6)-1(b) (1939 Code). See I.T. 1800, II-2 Cum. Bull. 152 (1923), declared obsolete by Rev. Rul. 69-43, 1969-1 Cum. Bull. 310; I.T. 1827, II-2 Cum. Bull. 154, declared obsolete by Rev. Rul. 69-43, supra. But cf. Sol. Op. 159, III-I Cum. Bull. 480 (1924), allowing a charitable contribution deduction for a bequest for the construction of a community auditorium, on the basis that Congress "intended that [the term 'charity'] should cover all bequests as might properly be classified as charitable at common law."

The authoritative force of the outstanding Regulation is not undermined by the fact that it represents a change from its predecessors. The outstanding Regulation "'implement[s] the congressional mandate in some reasonable manner' * * *." Hence, its construction of the generalized term "charity" must be sustained. National Muffler Dealers Assn. v. United States, 440 U.S. 472, 476, 488 (1979) (quoting United States v. Cartwright, 411 U.S. 546, 550 (1973), quoting United States v. Correll, 389 U.S. 299, 307 (1967)). This Court has repeatedly confirmed the Treasury's right to change its Regulations and rulings and correct its position in light of its administrative experience. Morrissey v. Commissioner, 296 U.S. 344, 354-355 (1935); Helvering v. Wilshire Oil Co., 308 U.S. 90, 99-103 (1939); Helvering v. Reynolds, 313 US. 428, 431-433 (1941); Commissioner v. P.G. Lake, Inc., 356 U.S 260, 265-266, n.5 (1958); National Muffler Dealers Assn. v. United States, 440 U.S. 472, 485-486 (1979); Dixon v. United States, 381 U.S. 68, 73-76 (1965); Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184-186 (1957).

170(c)(2). _/ Given the substantial body of decisional law rejecting the enforcement of racial restrictions in bequests or trusts and the Treasury's implementation of those principles in construing the federal tax exemption provisions, it cannot be said that no "'fair warning'" has been given "of the bounds of 'Federal public policy'" (No. 81-3 Br. 34).

2. The Commissioner's ruling finds further support in the statutory right of "[a]ll persons within the jurisdiction of the United States * * * [to] have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *." Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981. In Runyon v. McCrary, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are blacks. As the Court there concluded (id. at 172-173), "It is apparent that the racial exclusion practiced by the [schools] amounts to a classic violation of §1981. The parents * * * sought to enter into contractual relationships.

_/ See, e.g., Rev. Rul. 71-447, supra; Rev. Rul. 67-325, 1967-2 Cum. Bull. 113 (organization providing free recreational facilities restricted to less than the entire community on the basis of race is not entitled to Section 501(c)(3) exemption or eligible for deductible charitable contributions); Rev. Rul. 69-545, 1969-2 Cum. Bull. 117 (organization providing hospital care on a nonprofit basis for members of its community furthers purpose considered charitable in the generally accepted legal sense and therefore is eligible for Section 501(c)(3) exemption; see Simon v. Eastern Kentucky Welfare Rights Org., supra, 426 U.S. 26); Rev. Rul. 76-442, 1976-2 Cum. Bull. 148 (organization providing free tax and estate planning services to encourage donations to charitable organizations is not engaged in a charitable activity in the generally accepted legal sense and therefore is not entitled to Section 501(c)(3) exemption). See also Rev. Rul. 78-68, 1968-1 Cum. Bull. 149 (organization designed to participate in implementing the Demonstration Cities in Metropolitan Development Act of 1966, 42 U.S.C. 3301, et seq., was exempt); Professional Standard Review v. Commissioner, 74 T.C. 240 (1980) (organization which promoted implementation of Social Security Amendments of 1972, 86 Stat. 1430, Sections 249F(b), was exempt); Rev. Rul. 77-69, 1977-1 Cum. Bull. 143 (organization which assisted in implementing the National Health Planning and Resources Development Act of 1974, P.L. 93-641, 88 Stat. 2225, was exempt).

* * * for educational services * * *. * * * But neither school offered services on an equal basis to white and nonwhite students. * * * The * * * conclusion that §1981 was thereby violated follows inexorably from the language of that statute as construed in Jones [v. Alfred H. Mayer Co., 392 U.S. 409 (1968)], Tillman [v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973)], and Johnson [v. Railway Express Agency, 421 U.S. 454 (1975)]."

In so holding, the Court rejected the schools' contention that Section 1981, as so applied, violates constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his children (id. at 175-179).

Putting aside petitioners' claims that their racial policies were based on religious doctrine, / it seems clear that 42

/ We discuss petitioners' First Amendment claims at pages ____, Infra.

To be sure, the Court pointed out in Runyon that the case did not "present the application of §1981 to private sectarian schools that practice racial exclusion on religious grounds" (emphasis in original; footnote omitted) (427 U.S. at 167). However, the Court in Runyon did reject a comparable First Amendment claim based upon freedom of association. As the Court there stated (427 U.S. at 176; emphasis in original):

> * * * [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in Norwood v. Harrison, 413 U.S. 455, "the Constitution * * * places no value on discrimination," id. at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment * * * it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." Id. at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."

For similar reasons, while a religiously oriented private school may have a right to espouse racial segregation in its teaching, it has no right to hold itself open to the public on a racially discriminatory basis--any more than a religious group would have a First Amendment right to purchase an apartment development and rent it to the public on a racially discriminatory basis or to purchase a factory or department store and employ whites only. (Similarly, an individual employer would not, for example, have a First Amendment immunity from the National Labor Relations Act if he sincerely believed that he had a religious duty to deal with his employees directly rather than through union intermediaries.) Such commercial practices are far removed from such questions as the right to control employment policies within a church itself or admissions practices in seminaries and other non-public religious educational institutions. See generally Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1150-1151 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 312 (plurality opinion), 326 (Roney, J., dissenting) (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

U.S.C. 1981, as construed by Runyon, makes illegal their racially discriminatory practices and subjects them to damage suits by parties injured by such practices. / And surely petitioners' violation of 42 U.S.C. 1981 is relevant in any determination whether they are "charitable" for purposes of tax exemption under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170(c). An educational institution that maintains racially discriminatory admissions policies prohibited by federal civil rights statutes cannot be deemed to benefit society as a whole and is therefore not "charitable" under the Internal Revenue Code. Accordingly, Bob Jones University's claim (Br. 20 n. 19; 29) that it has not been charged with violation of any federal statute does not mitigate the illegality of its conduct under Section 1981. Rather, it simply reflects the fortuity that none of its applicants excluded on racial grounds (see J.A. A89-A90), nor any student expelled for participation in, or advocacy of, an interracial association (see 81-3 Pet. App. A4), has brought suit under Section 1981. See Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1150-1151 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321-324 (5th Cir. 1977) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).

3. In our view, the decisions rejecting petitioners' racially restrictive practices as the proper subject of a charitable educational trust, the incompatibility of those practices with the highly articulated public policy against racial discrimination in education, and the illegality of such policies under Section 1981, offer sufficient justification for the Commissioner's ruling that such practices are incompatible with tax exempt status and eligibility for deductible charitable contributions. But the fact that tax exemption and eligibility for deductible charitable contributions represent a form of

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/ Petitioner Bob Jones University's brief conspiciously avoids any reference to Runyon, despite the court of appeals' reliance on it (81-3 Pet. App. A9).

indirect government subsidy of an educational institution is a further consideration in support of the decision below.

In Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954), this Court proclaimed that the maintenance of a racially segregated school system by a state or federal authority abridges the constitutional right of black school children to the equal protection of the laws. Although Brown and Bolling involved segregated public education, their equal protection rationale prohibits governmental aid to racially restricted private education. Thus, the Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. See cases cited in Norwood v. Harrison, 413 U.S. 455, 463 n.6 (1973). There, the Court struck down a state program under which students borrowed textbooks without regard to whether the students attended private schools with racially discriminatory policies. As the Court stated in Norwood (413 U.S. at 465), "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish' Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967)." See also Griffin v. County School Board, 377 U.S. 218 (1964).

Here, it is beyond question that the federal government could not promote petitioners' admittedly discriminatory policies by providing direct financial aid to petitioners. But, as we have pointed out (supra, p.), federal tax exempt status and eligibility for deductible charitable contributions represent significant indirect material aid in the form of matching grants. Petitioners dispute the effect of a tax exemption and claim (No. 81-1 Br. 42) that it "'constitute[s] mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy'" Walz v. Tax Commission, 397 U.S. 664, 691 (1970) (Brennan, J., concurring)." See also id. at 676. These cases, however, do not

simply involve passive tax exemptions of the type involved in Walz, in which the government arguably withdraws from the affairs of the affected institutions. As the three-judge district court correctly observed in Green v. Kennedy, 309 F. Supp. 1127, 1134 (D.D.C. 1970), "The support which is significant in the context of this controversy is not the exemption of the schools from taxes laid on their income, but rather the deductions from income tax available to the individual, and corporations, making contributions supporting the school." See also 81-3 Pet. App. A10-A11 n.7.

While we do not suggest that such indirect aid is, in all circumstances, constitutionally equivalent to the direct state aid that both the Constitution and federal statutes _/ prohibit, _/ the Commissioner of Internal Revenue could well have concluded that prohibiting tax exemptions and eligibility for deductible charitable contributions for racially discriminatory private schools would avoid constitutional problems. As Commissioner of Internal Revenue Randolph W. Thrower explained, "President Nixon endorsed the IRS position after it became increasingly clear that there are serious legal and constitutional implications in the Government's allowing tax exemption and the deduction of contributions for such private schools." IRS Press Release, July 22, 1970, Hearings, supra, pp. 2005-2006. In

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_/ See Sections 401(c) and 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000c, 2000d. These statutes respectively call upon the government to terminate segregation in private schools "operated * * * predominantly from or through the use of governmental funds or property" and prohibit racial discrimination in "any program or activity receiving Federal financial assistance." By its terms, Section 601 does not prohibit the indirect assistance provided by tax-exempt status and eligibility for deductible charitable contributions. Otherwise, there would have been no need for the statute to require the identification of the particular program or activity receiving federal financial assistance.

_/ To the contrary, the Commissioner has always regarded the statutory provisions authorizing the deduction of charitable contributions to be validly applicable to private contributions to churches, even though direct grants of governmental funds to churches presumably would violate the Establishment Clause. See note , supra.

short, while the Commissioner's ruling position may not be constitutionally compelled, it forecloses the constitutional challenge that would occur had he not so ruled. _/ Surely the Commissioner's statutory authority to promulgate "all needful rules and regulations" (26 U.S.C. 7805(a)) under the internal revenue laws encompasses the power to construe the Internal Revenue Code in a manner that will insure that the government will not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish" (Lee v. Macon County Board of Education, supra, 267 F. Supp. at 475-476).

4. Furthermore, as the court below pointed out (No. 81-3 Pet. App. A8), the Commissioner's ruling is buttressed by the well-settled rule that federal tax benefits are generally not allowable if they would frustrate public policy. In Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941), the Court upheld a Treasury Regulation pursuant to which the Commissioner had denied business deductions claimed by a corporation for sums expended to "promot[e] legislation" (id. at 336-338). Rejecting the argument that "the administrative agency usurped the legislative function * * *," the Court pointed out that "[c]ontracts to spread such insidious influences through legislative halls have long been condemned." It concluded (id. at 338-339), "[t]here is no reason why, in the absence of clear congressional action to the contrary, the rulemaking authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family

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_/ Indeed, the Commissioner's ruling was issued after adopting the plaintiffs' position in the midst of the Green litigation. See p. , n. , supra. The three-judge district court in that case likewise observed that "[w]e are fortified in our view of the correctness of the IRS construction by the consideration that a contrary interpretation of the tax laws would raise serious constitutional questions * * *" (330 F. Supp. at 1164).

of contracts to which the law has given no sanction." See also Cammarano v. United States, 358 U.S. 498, 511-513 (1959); Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930).

Similarly, in Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958), the Court held that fines paid for violations of state highway weight limits were not deductible as "ordinary and necessary" business expenses. "A finding of 'necessity' cannot be made," the Court ruled, "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." Accord: Hoover Express Co. v. United States, 356 U.S. 38 (1958); McDonald v. Commissioner, 323 U.S. 57 (1944); cf. Commissioner v. Heininger, 320 U.S. 467, 473-475 (1943); Commissioner v. Sullivan, 356 U.S. 27 (1958); see Mazzei v. Commissioner, 61 T.C. 497 (1974); Turnipseed v. Commissioner, 27 T.C. 758 (1957). _/

The rationale of the Tank Truck Rentals decision is equally applicable here. Just as the Court refused to permit a tax deduction for a fine because the deduction would lessen the economic impact of the fine and thereby "frustrate sharply defined national or state policies proscribing particular types of conduct," here, too, allowance of tax exemptions and eligibility for deductible charitable contributions for racially restrictive private schools such as petitioners would frustrate the national policy against support for racial segregation of schools, public or private. Since the purpose of the tax exemption provisions for charitable organizations is to aid those institutions that are "charitable" (in the common law sense) and

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_/ In the Tax Reform Act of 1969, Congress codified the public policy doctrine in the business expense area by adding Sections 162(c), (f), and (g) to the Code. These provisions deny deductions for bribes paid to public officials (whether or not foreign officials), and other unlawful bribes or "kickbacks." See S. Rep. No. 91-552, 91st Cong. 1st Sess., pp. 273-274 (1969).

serve society as a whole, the national policy against segregated education forecloses petitioners' eligibility for these benefits.

Contrary to Bob Jones University's assertion (Br. 20), the Commissioner's position based upon the Green rationale does not put in jeopardy the Section 501(c)(3) tax exemption of organizations that "discriminate on account of age, maintain unsafe or unhealthful working conditions, create any financial barrier to education, based on sex, or create any environmental disharmony * * *". Nor does it suggest that "violation by a 501(c)(3) organization of zoning laws, building codes and myriad other state proscriptive laws would necessitate revocation of federal tax exemption" (ibid.; footnote omitted). The mere fact that a charitable organization may have violated a particular law does not mean that it has lost its charitable character--and Congress certainly has not charged the Commissioner with monitoring such organizations for all possible legal infractions. _/ Of the foregoing examples, the only one that presents a question at all comparable to the present one would be a policy of sex discrimination. The Commissioner, however, has not sought, and does not intend to seek, to extend his ruling to sex discrimination, as to which both constitutional _/ and federal statutory proscriptions are far less pervasive than they

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_/ Indeed, even an isolated instance of racial discrimination, contrary to a school's general policies, would not, in our view, result in loss of tax-exempt status.

_/ This Court has repeatedly rejected the proposition that classifications based on sex are subject to the same standard of strict scrutiny applicable to racial classifications.

are with respect to race discrimination. _/ The issue here is limited to whether petitioners' racially discriminatory policies prevent them from qualifying as tax-exempt "charitable" organizations under Section 501(c)(3) of the Internal Revenue Code.

D. Congress has repeatedly considered the Commissioner's statutory interpretation that racially discriminatory private schools are not tax exempt and has refused to alter it and, indeed, has made other statutory changes

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_/ For example, 42 U.S.C. 1981 comprehensively prohibits the abridgment of the right of contract on account of race (see pages , supra), but there is no similar federal statutory provision prohibiting sex discrimination.

Moreover, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which otherwise prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, contains an exception for employment of members of a particular religion, sex,or national origin, "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *" (42 U.S.C. 2000e-2(e)). There is, however, no similar exception with respect to race.

Similarly, there are a number of exceptions applicable to the federal prohibitions against sex discrimination in education set forth in Title IX of the Civil Rights Act of 1964. The federal statute bars sex discrimination in any "education program or activity receiving Federal financial assistance" (20 U.S.C. 1681(a)). But it applies in regard to admissions "only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education" (20 U.S.C. 1681(a)(1)). There are other exceptions from the prohibition of sex discrimination for educational institutions of religious organizations with contrary religious tenets (20 U.S.C. 1681(a)(3)), educational institutions training individuals for the military (20 U.S.C. 1681(a)(4)), and for "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex" (20 U.S.C. 1681(a)(5)). There are, again, however, no comparable exceptions in Title VI of the 1964 Act prohibiting racial discrimination.

Finally, in Griffin v. Breckenridge, 403 U.S. 88 (1971), this Court ruled that Section 2 of the Civil Rights Act of 1871, 42 U.S.C. 1985(c), provides a cause of action for damages caused by private conspiracies arising in a context of racial discrimination. However, the Court has also held that the same statute may not be invoked in a case involving a claim of discriminatory employment practices on the basis of sex. Great American Fed. S. & L. Assn. v. Novotny, 442 U.S. 366 (1979).

premised on the validity of that interpretation

Since the Commissioner announced his statutory interpretation that racially discriminatory private schools are not tax exempt, Congress has been fully aware of the Service's position, has repeatedly considered the propriety of his ruling, and has refused to alter it. Indeed, as we shall show, to the extent Congress has acted in this area, it has extended the non-discrmination principle to the tax-exempt status of private social clubs, and modified the procedures that the Service employs for testing the bona fides of the racial policies of private schools -- basing both actions on the premise that the Commissioner's interpretation was correct. After carefully considering the question on several occasions, however, Congress has rejected several attempts to set aside the Service's substantive legal position that petitioners seek to challenge. In these circumstances, judicial deference to the agency's interpretation of a statute is especially appropriate "'when Congress has refused to alter the admininstrative construction' * * * [and] that construction accords with well-established congressional goals." Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 248, 251 (1978), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation * * *, then presumably the legislative intent has been correctly discerned." United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

1. The chronology of Congress' continuing attention in this area necessarily begins with the Treasury's 1959 modification of the Regulations under Section 501(c)(3). As we have pointed out

(supra, p.), the modification to Section 1.501(c)(3)-(d)(2) of the Regulations established the primacy of the "charitable" requirement by providing that the term "charitable" is used "in its generally accepted legal sense and is, therefore not to be construed or limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes * * *." This Regulation was extant during Congress' comprehensive review of the tax-exempt area in the Tax Reform Act of 1969, in which the tax on the activities of certain private foundations was added to the Code. See, e.g., Sections 508, 509, 4940 et seq. Moreover, in 1976, Congress specifically amended Section 501(c)(3) to confer tax-exempt status upon organizations to foster national or international sports competition. See Pub. L. 94-455, Section 1313(a), Stat. . Significantly, Congress did not disapprove the Secretary's interpretation at the time of these subsequent legislative changes. The Regulations are therefore an authoritative interpretation as to which Congress is deemed to have given its approval. See, e.g., Helvering v. Winmill, 305 U.S. 79, 82-83 (1938); Lykes v. United States, 343 U.S. 118, 127 (1952); Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

Congress further considered the matter shortly after the Commissioner announced his position with respect to racially discriminatory schools on July 10, 1970. One month later, Commissioner Thrower testified before the Senate Select Committee on Equal Educational Opportunity in order to explain the Service's policy, the standard that was to be applied, and the modes of enforcement. During the hearings, Senator Mondale, the Chairman of the Committee, pressed Commissioner Thrower not to accept a private school's assurance of a non-discriminatory admissions policy but to monitor attendance records. See Hearings, supra, pp. 1992-2028. In response, the Commissioner promised that the Service would investigate schools that do not follow a declared nondiscriminatory admissions policy and would take appropriate action. Id. at 2028.

In 1976, Congress extended the nondiscrimination principle to the tax-exempt status of private social clubs. By the Act of Oct. 20, 1976, Pub. L. No. 94-658, Section 2(a), 90 Stat. 2697, Congress added to the Code, "in view of national policy," / the provision now contained in Section 501(i), which explicitly denies exempt status to a social club if its charter or any of its written policy statements provides for "discrimination against any person on the basis of race, color, or religion." This provision was added in direct response to a ruling by a three-judge court in McGlotten v. Connally, 338 F. Supp. 448, 457-459, 462 (D.D.C. 1972), that recognition of racially segregated social clubs as tax-exempt entities under Section 501(c)(7) did not violate the Code, the Constitution, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. The accompanying committee reports in both Houses / reflect Congress' intent to apply to social clubs the same antidiscrimination rule involved here. Indeed, both Reports (in footnote 5 of each) cite with approval the three-judge district court's decision in Green v. Connally, supra, and this Court's affirmance of it, for the proposition "that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))." / Congress

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/ S. Rep. No. 94-1318, 94th Cong., 2d Sess. (1976).

/ Id. at 7-8 & n.5; H. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).

/ Petitioner Bob Jones University (Br. 16 n.15) argues that the "mere reference [to Green] is not remotely an endorsement of Green's construction of §501(c)(3)." But the pertinent Committee Reports cited and described the holding in Green in order to assimilate Congress' application of the nondiscrimination principle to social clubs to the court's ruling with respect to private schools. Even if it is assumed that the affirmance of Green by this Court "lacks the precedential weight of a case involving a truly adversary controversy" (Bob Jones University v. Simon, 416 U.S. at 740 n.11), that would not detract from the force of the three-judge district court's opinion in Green and the House and Senate Reports' citation of it as a proper foundation for Congress's enactment of Section 501(i). Moreover, the appeal to this Court in Green was by intervenors opposed to the district court's judgment and thus to the position of the plaintiffs (see the government's Motion to Dismiss, No. 71-425, pages 2-5), and the Court chose to affirm the judgment rather than grant the government's Motion to Dismiss. 404 U.S. 997. See the discussion of the procedural history of Green in this Court in the Brief Amicus Curiae of the N.A.A.C.P. Legal Defense and Education Fund, Inc., at pp. 11-12 n.10.

therefore continued to be well aware of the Service's policy implemented six years earlier that discrimination on account of race is inconsistent with an educational institution's tax-exempt status under Section 501(c)(3) and also with its status as a donee of deductible charitable contributions under Section 170(c)(2) - - and specifically premised a legislative extension of that policy on the policy's validity as a correct interpretation of the statute. _/ There is accordingly no basis for petitioner Bob Jones University's claim (Br. 22) that "The Green opinion calls for a plain usurpation of Congressional law making powers by the non-elected public servants of the Internal Revenue Service." _/

_/ In 1980, Congress again amended Section 501(i) to provide that the prohibition against discrimination by social clubs on religious grounds shall not apply to an auxiliary of a fraternal beneficiary society which "limits its membership to the members of a particular religion" or "a club which in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude individuals of a particular race or color." The legislative history indicates that Congress intended to benefit religious organizations such as the Knights of Columbus and Catholic Alumni Clubs. See H. Rep. No. 96-545, 96th Cong., 1st Sess., p. 21 (1980); S. Rep. No. 96-103, 96th Cong., 2d Sess., pp. 9-10 (1980); Hearings Before the Subcommittee on Taxation and Debt Management of the Senate Committee on Finance, 96th Cong., 2d Sess., pp. 329 et seq. (1980). Although the House version of the bill would have simply exempted social clubs which limited their membership to the members of a particular religion, the Senate version, which was enacted, reflects Congress' intent to affirm once again the nondiscrimination principle as to race. Thus, the Senate Committee Report (S. Rept. No. 96-103, supra, p. 10):

> Such [alumni] clubs will continue to be eligible for exemption provided the religious limitation on membership is designed in good faith, to further the teachings or principles of that religion, and not for the purpose of excluding individuals of a particular race or color. The provision is intended to benefit Catholic Alumni Clubs, but it is not intended to authorize discrimination on the basis of race under the guise of religious affiliation.

S. Rep. No. 96-103, supra, p. 10.

_/ Moreover, as we have pointed out (supra, p.), the President himself concurred in and approved the Service's ruling position at the time of its announcement.

3. Finally, the more recent enactment by Congress of the Ashbrook Amendment (Section 103) and Dornan Amendment (Section 615) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, further strengthens the case for congressional acquiescence in the Service's substantive legal position that racially discriminatory private schools are not entitled to tax exempt status. We have described the nature of this legislative oversight in greater detail in our petition for certiorari in Regan v. Wright, No. 81-970, pp. 20-23, and refer the Court to that discussion. _/ By its terms, the Ashbrook Amendment prohibits the Internal Revenue Service from using any funds appropriated to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church operated schools under section 501(c)(3) * * * unless in effect prior to August 22, 1978." The Dornan Amendment prohibits the funding of two proposed revenue procedures announced in 1978 and 1979. _/ Hence, as the court of appeals correctly pointed out (81-3 Pet. App. A5-A6, n.3), the Ashbrook and Dornan Amendments are, of course, prospective in operation

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_/ We are serving a copy of our petition in Regan v. Wright upon petitioners in these cases.

_/ The Internal Revenue Service proposals of 1978 and 1979 were designed to supplement its existing procedures for verifying whether the actual practices of certain schools conformed to their certifications of nondiscrimination. Those proposals provoked a large volume of adverse testimony before Congress. See Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979). In Section 615 (93 Stat. 577) of the Treasury, Postal Service, and General Government Appropriations Act, supra, Congress stipulated that none of the funds made available by the Act be used to carry out the proposed revenue procedures of 1978 and 1979. In Section 103 (93 Stat. 562) of the same Act, Congress provided that none of the funds made available by the Act be used "to formulate or carry out any * * * procedure, guideline * * * or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

and do not apply to the substantive or procedural policies enforced in these cases. See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587. The object of the Amendments, as petitioner Goldsboro Christian Schools concedes (81-1 Br. 28, n.13), was to "maintain the status quo" by temporarily barring the employment of proposed new procedures to enforce the policy of the Internal Revenue Service. See 43 Fed. Reg. 37296-37298 (Aug. 22, 1978); 44 Fed. Reg. 9451-9455 (Feb. 9, 1979).

But, more importantly, the accompanying legislative history of the Ashbrook and Dornan Amendments confirms Congress' intent to leave fully intact, and, indeed, to sanction, the existing nondiscrimination policies of the Service. On presenting his amendment, Representative Dornan stated (125 Cong. Rec. H5982 (daily ed. July 16, 1979)), "[l]et me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50." Similarly, when Senator Helms later introduced the Ashbrook Amendment in the Senate, he emphasized that it would not impair the effectiveness of outstanding procedures for enforcing a requirement of nondiscrimination (125 Cong. Rec. S11979-S11980 (daily ed. Sept. 6, 1979) (emphasis supplied)): "In fact, IRS has denied the tax-exempt status of over 100 schools <u>which it, or a court, has found to be discriminatory</u>. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against <u>offending</u>

schools on a case-by-case basis." _/ In sum, by enacting the Ashbrook and Dornan Amendments, Congress in effect told the Internal Revenue Service that it should continue to enforce the nondiscrimination principle as long as it adhered to certain procedures and abandoned other proposed means of investigation and inquiry.

It is also significant that since the Commissioner announced the nondiscrimination policy on July 10, 1970, with the concurrence and approval of the President, numerous bills introduced in Congress have sought to modify the substantive principle that a racially discriminatory private school is not "charitable" within the meaning of Section 501(c)(3) and not eligible for deductible charitable contributions under Section 170. _/ None of them, however, has been enacted.

As this Court concluded in comparable circumstances in Runyon v. McCrary, supra, 427 U.S. at 174-175, "There could hardly be a clearer indication of congressional agreement with the view [announced by the Commissioner] * * *. Cf. Flood v. Kuhn, 407 U.S. 258, 269-285 [1972]; Joint Industries Board v. United States, 391 U.S. 224, 228-229 [1968]."

_/ To be sure, on the preceding day Senator Helms spoke at some length in criticism of the Commissioner's position that a racially discriminatory private school is not "charitable" under the tax laws. See 125 Cong. Rec. S11833-S11837 (daily ed. Sept. 5, 1979). Those remarks, however, were offered as his individual views. His statement quoted above in the text represents the consensus upon which the Senate voted in favor of the Ashbrook Amendment.

_/ See H.R. 68, 92d Cong., 1st Sess. (January 22, 1971); H.R. 2352, 92d Cong., 1st Sess. (January 25, 1971); H.R. 5350, 92d Cong., 1st Sess. (March 2, 1971); H.R. 1394, 93d Cong., 1st Sess. (January 6, 1973); S.103, 96th Cong., 1st Sess. (January 15, 1979); H.R. 1002, 96th Cong., 1st Sess. (January 19, 1979); H.R. 1905, 96th Cong., 1st Sess. (February 8, 1979); S.449, 96th Cong., 1st Sess. (February 22, 2979); S.995, 96th Cong., 1st Sess. (April 9, 1979); H.R. 332, 97th Cong., 1st Sess. (January 9, 1981); H.R. 95, 97th Cong., 1st Sess. (January 5, 1981); H.R. 802, 97th Cong., 1st Sess. (January 9, 1981); H.R. 5186, 97th Cong., 1st Sess. (December 11, 1981).

E. The Commissioner's denial of petitioners' tax exemption because of their racially restrictive policies does not violate their right to free religious belief and exercise under the First Amendment

Both Goldsboro Christian Schools (Br. 31-44) and Bob Jones University (Br. 23-34) seek to excuse their failure to satisfy the nondiscrimination principle on the ground that their racially discriminatory practices are the outgrowth of sincere religious faith. But, as the court of appeals correctly held (81-3 Pet. App. A13-A14; footnote omitted), "the government's rule would not prohibit [petitioners] from adhering to [their] policy. Abandonment of the policy would not prevent [petitioners] from teaching the Scriptural doctrine of nonmiscegenation. Nor is any individual student * * * forced to personally violate his beliefs; no student is forced to date or marry outside of his race. We think these factors tip the balance in favor of the Service's nondiscrimination doctrine." Moreover, the Service's policy, applied evenhandedly to sectarian and nonsectarian schools, avoids government entanglement in matters of church doctrine, and does not involve preference of one sect or doctrine over another. Hence, the court of appeals concluded that "[t]he nondiscrimination policy also passes muster under the Establishment Clause" (id. at A14).

Since all that is at issue here is tax exempt status rather than a governmental prohibition of any of petitioners' practices, analysis begins with the principle that, while exemption from nondiscriminatory application of generally applicable tax laws is a constitutionally permissible accommodation of charitable organizations including churches themselves (see Walz v. Tax Commission, supra), it presumably is not constitutionally required. Once such exemptions have been granted, however, very serious First Amendment problems would be presented by any attempt to differentiate among churches or other religious organizations on the basis of their beliefs or religious practices. A grave constitutional problem would be presented, for example, if an exemption were to be denied solely because of

admissions practices in a seminary or because the tenets of a faith disqualify certain classes of persons from eligibility for its clergy. Thus, in a news release issued nine days after its ruling with respect to private schools, the Service stated that "selectivity of students, as by a religious seminary, having no relation to racial discrimination would not be inconsistent with the IRS statement of position" (No. 81-3 J.A. A239).

On the other hand, some religious practices (even as part of a worship service), such as human sacrifice, may constitutionally be prohibited and, a fortiori, may constitutionally serve as a basis for denial of tax exempt status. Here, basically for the reasons we have discussed (pages , supra) concerning the applicability of 42 U.S.C. 1981 to petitioners, we submit that there is no constitutional impediment to basing denial of tax exempt status on petitioners' admissions practices (which involve commercial dealings with the public).

1. a. It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)), governmental interference with the dissemination of religious ideas (see Fowler v. Rhode Island, 345 U.S. 67 (1953); Follett v. Town of McCormick, 321 U.S. 573 (1944)), or use of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." Braunfeld v. Brown, 366 U.S. 599, 607 (1961). But as the Court has also noted, "neutral prohibitory or regulatory laws having secular aims" may impose certain "incidental burdens' on free exercise when "the burden on First Amendment values is * * * justifiable in terms of the Government's valid aims." Gillette v. United States, 401 U.S. 437, 462 (1971); see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).

Thus, a person is not protected from every burden on the exercise of his religion resulting from the implementation of a neutral, secular governmental interest. Braunfeld v. Brown, supra, 366 U.S. at 603; Johnson v. Robison, 415 U.S. 361, 383-386 (1974); Gillette v. United States, supra, 401 U.S. at 461-462; see Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878); Jacobson v. Massachusetts, 197 U.S. 11 (1905). In determining whether a particular statute is supported by a governmental interest that outweighs a free exercise claim, it is appropriate (McDaniel v. Paty, 435 U.S. 618, 635, n.8 (1978) (Brennan, J., concurring in the judgment)) --

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See Wisconsin v. Yoder, supra, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise of the First Amendment"); Johnson v. Robison, supra; Gillette v. United States, supra. However,"to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." Braunfeld v. Brown, supra, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. Follett v. Town of McCormick, supra, 321 U.S. at 577-578; Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); see Braunfeld v. Brown,

supra, 366 U.S. at 606; cf. United States v. Lee, 479 F. Supp. 180 (W.D. Pa. 1980), appeal pending, No. 80-767, argued November 2, 1981. /

Here, despite petitioners' claims to the contrary (81-1 Br. 36; 81-3 Br. 9), the Service's rulings do not place more than an indirect and limited burden upon any person's or any corporation's right to free religious belief or exercise. Petitioners do not seek on religious grounds to limit their student body to members of a particular sect or to those who espouse particular beliefs. Rather, the focus of the policies of petitioners' at issue here is on racially discriminatory practices, not on beliefs. In requiring that petitioners maintain racially non-discriminatory policies as a prerequisite to tax-exempt status, the Service does not purport to interfere with their right to espouse or teach a doctrine against interracial marriage, or with any student's right to adhere to such a doctrine. See Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321-322 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978). / Indeed, as this Court has noted (Runyon v. McCrary, 427 U.S. 160, 176 (1976), quoted, supra, p. n.), even if the right of parents to have their children educated in schools fostering a belief in racial discrimination is assumed to be protected by the First Amendment, the First Amendment does not protect a school's practice of racial discrimination. See also Bob Jones University

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/ We submit, for example, that the First Amendment would not immunize a church from the tax on unrelated business income (see Sections 511-513 of the Code) if the church believed that it was its religious duty to conduct a business in competition with a particular company. See particularly Sections 512(b)(14) and 7605(c) of the Code.

/ Nor do the Service's actions implicate the interests of a church in maintaining the intimacy of its activities, as petitioner Bob Jones University urges (81-3 Br. 23-25). Petitioners offer to the public on a commercial basis educational services that compete with programs of instruction in other schools and colleges (Pet. App. A3; J.A. A88-A89). Hence, "'Their actual and potential constituency * * * is more public than private.'" Runyon v. McCrary, 427 U.S. 160, 172, n.10 (1976) (quoting 515 F.2d 1082, 1089).

v. Johnson, 396 F. Supp. 597, 606-608 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

b. Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, supra, upon which petitioners rely (81-1 Br. 33-34, 81-3 Br. 23 et seq.), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome than here. In Sherbert, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in Sherbert was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in Thomas v. Review Board, No. 79-952 (Apr. 6, 1981), in which the petitioner terminated his employment when he was assigned to armament production. Petitioners face no similar choice here.

Similarly, in Yoder, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal education requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in Yoder thus was either to risk losing their

children from their faith or to violate the law. No such choice need be made here. Although petitioners claim that their discriminatory practices are the product of religious belief, they are free to continue to maintain their racial restrictions and relinquish their claim to tax exemption and deductible charitable contributions. Alternately, petitioners can eliminate their racially restrictive admissions policies and other rules but continue to teach their religious belief in the separation of races. Unlike Sherbert and Yoder, the Service's policy therefore does not threaten the integrity of petitioners' religious beliefs or observances. See also McDaniel v. Paty, supra; Torcaso v. Watkins, 367 U.S. 488 (1961).

2. Finally, the court of appeals correctly held (81-3 Pet. App. A15-A16) that the Service's policy did not transgress Establishment Clause values because it avoids excessive entanglement with religion by appyling its policy to all religiously operated schools (as well as nonreligious schools). Thus, contrary to petitioner Bob Jones University's contention (Br. 32), the Service's policy does not have "the effect of creating a religious preference" and "official hostility toward non-preferred religions." In enforcing its ruling, the only inquiry that the Service uniformly undertakes is the relatively narrow inquiry whether the school maintains racially non-discriminatory policies. Such an inquiry does not involve the government in preferring one religion over another, or even concerning itself with whether racial discrimination is motivated by religious belief. All private schools must demonstrate compliance with the nondiscrimination principle. Hence, the Service's policy does not violate the Establishment Clause. As the court of appeals pointed out (81-3 Pet. App. A16), "the principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." See Gillette v. United States, 401 U.S. 437, 454-458 (1971). "And, the uniform application of the rule to all

religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (81-3 Pet. App. A15-A16; emphasis in original). Cf. Brown v. Dade Christian Schools, Inc., supra, 556 F.2d at 323-324 (Goldberg, J., concurring); Fiedler v. Marumsco Christian School, supra, 631 F.2d 1144; Bob Jones University v. Johnson, supra, 396 F. Supp. at 606. Accordingly, the minimum intrusion occasioned by the Commissioner's nondiscrimination policy does not violate the Establishment Clause.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General */

JOHN F. MURRAY
Acting Assistant Attorney General

STUART A. SMITH
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ROBERT S. POMERANCE
Attorney

JANUARY 1982

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*/ The Solicitor General is disqualified in these cases.

Supplemental Brief

1

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court granted writs of certiorari in the above-captioned cases and ordered consolidation on October 13, 1981. Petitioners seek reversal of the court of appeals' decisions upholding Internal Revenue Service rulings that were applied to them, because of certain racially discriminatory practices, to deny tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) ("Code") and sister Code provisions regarding federal social security taxes

(Section 3121(b)(8)(B) of the Code) and federal unemployment taxes (Section 3306(c)(8) of the Code), and to deny them status as eligible donees of charitable contributions under Section 170(a) and (c) of the Code.

Since the filing of our Brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code.[1]

The United States therefore asks that the judgments of the court of appeals be vacated as moot.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

JANUARY 1982

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[1]The applicable rulings are Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

*The Solicitor General is disqualified in these cases.

Supplemental Brief

2

Office - Supreme Court, U.S.
FILED
FEB 3 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

LAWRENCE G. WALLACE
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(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

We wish to inform the Court that on January 25, 1982, the government filed a response to the Plaintiffs' Motion to Vacate Stay of Proceedings, etc., in

the related litigation styled *Green* v. *Regan*, Civ. Action No. 1355-69 (D.D.C.).

For the convenience of the Court, we have reprinted that response in the Appendix, *infra*. Attached to that response is a copy of proposed legislation submitted by the President on January 18, 1982, which would give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-exempt status to private non-profit educational organizations with racially discriminatory policies. Copies of the statement by the White House press secretary, the proposed bill, the text of President Reagan's letter to the President of the Senate and the Speaker of the House, the Press Release of the Department of the Treasury dated January 18, 1982, and an affidavit of the Assistant Commissioner of the Internal Revenue for Employee Plans and Exempt Organizations, were attached to the government's response in *Green* and are likewise reproduced for the information of the Court. We are advised that both the House Ways and Means Committee and the Senate Finance Committee have scheduled hearings on the President's proposal in early February, 1982.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General *

FEBRUARY 1982

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* The Solicitor General is disqualified in these cases.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1355-69

WILLIAM H. GREEN, ET AL., PLAINTIFFS

v.

DONALD T. REGAN, ET AL., DEFENDANTS

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO VACATE STAY OF PROCEEDINGS, TO SHORTEN TIME FOR RESPONSE HERETO, AND FOR FURTHER INJUNCTIVE RELIEF TO ENFORCE DECLARATORY JUDGMENT AND PRESERVE THE STATUS QUO

Defendants submit that this Court's Order of January 6, 1982, staying all proceedings herein should be continued in effect until the United States Supreme Court enters its decisions in the consolidated cases of *Bob Jones University* v. *United States* (No. 81-3) and *Goldsboro Christian Schools, Inc.* v. *United States* (No. 81-1). Until the final status of these two Supreme Court actions becomes clear, defendants believe it would be premature to vacate the January 6, 1982 stay order in this case.[1]

A significant development since the filing of plaintiffs' motion is that on January 18, 1982 the President submitted proposed legislation to Congress to amend Code Section 501 to state expressly that effective after July 9, 1970, tax-exempt status may not

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[1] Defendants' counsel was advised today, January 25, 1982, by the Clerk's Office of the United States Supreme Court that no final action has been taken in the *Bob Jones* and *Goldsboro* cases, and that the Supreme Court will be in recess until February 22, 1982.

be accorded to private, non-profit educational organizations with racially discriminatory policies. At the same time the legislation was proposed, the Treasury Department announced that the Internal Revenue Service has been instructed "not to act on any applications for tax exemptions filed in response to the Internal Revenue Service's policy announced on Friday, January 8, 1982, until Congress has acted on the proposed legislation (except as required by the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982)." [2]

With respect to the subject matter of the instant case, as set forth in the Affidavit of S. Allen Winborne (Assistant Commissioner Employee Plans and Exempt Organizations), attached as Exhibit B, defendants have continued to comply with the outstanding injunction orders of this Court. Defendants have not taken any action to restore tax-exempt status to private schools in Mississippi which had their existing tax exemptions revoked or their applications for tax exemptions denied because of the injunction orders in this case.

Insofar as the revenue rulings and revenue procedures referred to in plaintiffs' motion are concerned, defendants believe that plaintiffs are erroneous in broadly interpreting the prior decisions in this case as limiting or prohibiting future administrative actions by defendants that affect private schools outside the State of Mississippi. These plaintiffs clearly

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[2] A copy of this proposed legislation and the related Treasury Department News Releases are attached as Exhibit A. The exception noted in the parenthesis portion of the above quotation from the January 18 Treasury Press Release concerns the petitioners in the two Supreme Court cases, neither of which operate a school in Mississippi covered by the outstanding orders in this case.

lack standing to complain about IRS administrative actions which have not resulted in defendants acting inconsistent with the extant injunction orders in this case. Nowhere in the outstanding declaratory judgment or injunction orders is there any directive concerning the adoption, modification or revocation of specific, national IRS revenue rulings or revenue procedures. Accordingly, since as indicated in the Winborne Affidavit, the defendants have continued to comply with the injunction orders of this Court with respect to Mississippi private schools, it is submitted there is no standing or other jurisdictional basis for plaintiffs' claim to the further injunctive relief requested in paragraph d of their motion as to the referenced IRS administrative rulings.

Moreover, as the pleadings and prior decisions in this case make clear, the purpose of this suit was and is to prohibit defendants "from according tax-exempt status and deductibility of contributions to private schools in Mississippi discriminating against Negro students." *Green* v. *Connally*, 330 F. Supp. 1140, 1151 [*sic*] (D. D.C. 1971), aff'd *sub nom.*, *Coit* v. *Green*, 404 U.S. 997 (1971). It is also apparent that the scope of the injunction orders entered in 1971, as modified in 1980, pertain solely to "Mississippi private schools or the organizations that operate them."[4] The inappropriateness of plaintiffs' current request for injunctive relief affecting IRS administrative policy with respect to private schools outside of Mississippi is clearly illustrated by the fact that counsel for plaintiffs brought a separate nationwide class action in order to accomplish relief of the type plaintiffs now claim there is a basis for granting in

[4] See this Court's Order and Permanent Injunction of May 5, 1980 at page 2.

the *Green* case. See *Wright* v. *Miller*, 480 F. Supp. 790 (D. D.C. 1979), rev'd 656 F. 2d 820 (D.C. Cir. 1981), petition for certiorari filed November 23, 1981 *Regan* v. *Wright* (S. Ct. 81-970). In effect, the bringing of the *Wright* action shows a recognition that the scope of this suit properly should be limited to IRS actions affecting tax-exempt status of private schools in the State of Mississippi, and as stated above, defendants have complied with the outstanding injunction orders entered in this case. Accordingly, defendants submit there is no jurisdictional basis in this suit for granting the broader injunctive relief plaintiffs now request.

Finally, defendants note that since every effort will be made by defendants to obtain prompt consideration of the recent legislation proposed to Congress, and since Congress presumably will have an opportunity to consider the complex issues now pending before this Court, this legislative development presents an additional basis for continuing the stay order now in effect.

CONCLUSION

For the foregoing reasons, defendants respectfully submit that plaintiffs' motion to vacate this Court's Order of January 6, 1982 should be denied.

Dated: January 25, 1982

Respectfully submitted,

/s/ Glenn L. Archer, Jr.
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/s/ John F. Murray
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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 18, 1982

FACT SHEET

Tax Exemption Bill Summary

The proposed legislation being submitted by the President to the Congress will, for the first time, give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-exempt status to private, non-profit educational organizations with racially discriminatory policies. The legislation recognizes and is sensitive to the legitimate special needs of private religious schools.

Section 1 of the bill adds to section 501 of the Internal Revenue Code a new subsection that expressly prohibits granting tax exemptions to private schools with racially discriminatory policies, notwithstanding that such schools otherwise meet the tests for exemption presently listed in section 501(c)(3).

Religious schools of all faiths are permitted to limit, or give preferences and priorities, to members of a particular religious organization or belief in their admissions policies or religious training and worship programs. However, the bill expressly provides that a tax exemption will not be granted if any such policy, program, preference or priority is based upon race or a belief that requires discrimination on the basis of race.

Section 2 of the bill amends several sections of the Internal Revenue Code dealing with deductions to provide, consistent with the exemption provisions of the new law, that no deductions will be allowed for contributions to a school with a racially discriminatory policy.

A BILL

To amend the Internal Revenue Code of 1954 to prohibit the granting of tax-exempt status to organizations maintaining schools with racially discriminatory policies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DENIAL OF TAX EXEMPTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended by redesignating subsection (j) as subsection (k) and inserting a new subsection (j) reading as follows:

"(j) ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—

"(1) IN GENERAL.—An organization that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such organization has a racially discriminatory policy.

"(2) DEFINITIONS.—For the purposes of this subsection—

"(i) An organization has a 'racially discriminatory policy' if it refuses to admit students of all races to the rights, privileges, programs, and

activities generally accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, athletic programs, or other programs administered by such organization in a manner that does not discriminate on the basis of race. The term 'racially discriminatory policy' does not include an admissions policy of a school, or a program of religious training or workshop of a school, that is limited, or grants preferences or priorities, to members of a particular religious organization or belief, *provided*, that no such policy, program, preference, or priority is based upon race or upon a belief that requires discrimination on the basis of race.

"(ii) The term 'race' shall include color or national origin."

SEC. 2. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

(a) Section 170 of the Internal Revenue Code of 1954 (relating to allowance of deductions for certain charitable, etc., contributions and gifts) is amended by adding at the end of subsection (f) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(b) Section 642 of such Code (relating to special rules for credits and deductions) is amended by adding at the end of subsection (c) a new paragraph (7) reading as follows:

> "(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(c) Section 2055 of such Code (relating to the allowance of estate tax deductions for transfers for public, charitable, and religious uses) is amended by adding at the end of subsection (e) a new paragraph (4) reading as follows:

> "(4) No deduction shall be allowed under this section for any transfer to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(d) Section 2522 of such Code (relating to charitable and similar gifts) is amended by adding at the end of subsection (c) a new paragraph (3) reading as follows:

> "(3) No deduction shall be allowed under this section for any gift to or for the use or an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

SEC. 4. EFFECTIVE DATE.

The amendments made by this Act shall apply after July 9, 1970.

THE WHITE HOUSE

Office of the Secretary

For Immediate Release January 18, 1982

TEXT OF LETTER SENT TO
THE PRESIDENT OF THE SENATE AND
THE SPEAKER OF THE HOUSE

Dear Mr. President/Mr. Speaker:

As you are aware, the Department of the Treasury announced on January 8 that the Internal Revenue Service would no longer deny tax-exempt status to private, non-profit educational organizations that engage in racially discriminatory practices but otherwise qualify for such status under the present Internal Revenue Code. That decision reflects my belief that agencies such as the IRS should not be permitted, even with the best of intentions and to further goals that I strongly endorse, to govern by administrative fiat by exercising powers that the Constitution assigns to the Congress.

I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and its citizens hold dear, and I believe this repugnance should be plainly reflected in our laws. To that end, I am herewith submitting to the Congress proposed legislation that would prohibit tax exemptions for any schools that discriminate on the basis of race. This proposed legislation is sensitive to the legitimate special needs of private religious schools.

I pledge my fullest cooperation in working with you to enact such legislation as rapidly as possible, and

urge that you give this matter the very highest priority.

I have been advised by the Secretary of the Treasury that he will not act on any applications for tax exemptions filed in response to the IRS policy announced on January 8, until the Congress has acted on this proposed legislation.

I believe the course I have outlined is the one most consistent both with our mutual determination to eradicate all vestiges of racial discrimination in American society, and with a proper view of the powers vested in the Congress under our constitutional system.

I feel this legislative action is important to and desired by all citizens of this great Nation; I am confident that you will give the issue the prompt attention it deserves.

Sincerely,

/s/ Ronald Reagan
RONALD REAGAN

TREASURY NEWS

Department of the Treasury
Washington, D.C.
Telephone: 566-2041

FOR IMMEDIATE RELEASE
Monday, January 18, 1982

Contract: Marlin Fitzwater
(202) 566-5252

TREASURY—IRS TO HOLD ACTION ON TAX EXEMPTIONS

Recognizing the President's desire to have legislation introduced to prohibit the granting of tax exemptions to certain educational institutions that engage in racially discriminatory practices, the Secretary of Treasury has instructed the Commissioner of Internal Revenue not to act on any applications for tax exemptions filed in response to the Internal Revenue Service's policy announced on Friday, January 8, 1982, until Congress has acted on the proposed legislation (except as required by the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1355-69

WILLIAM H. GREEN, ET AL., PLAINTIFFS

v.

DONALD T. REGAN, ET AL., DEFENDANTS

AFFIDAVIT

CITY OF WASHINGTON)
) ss
DISTRICT OF COLUMBIA)

S. ALLEN WINBORNE, being first duly sworn, deposes and says upon information and belief:

1. I am the Assistant Commissioner (Employee Plans and Exempt Organizations) and I am familiar with the steps taken by the Internal Revenue Service to implement the Orders of this Court dated May 5 and June 2, 1980.

2. This affidavit is being submitted in connection with plaintiffs' Motion to Vacate Stay of Proceedings to Shorten Time for Response Hereto, and for Further Injunctive Relief to Enforce Declaratory Judgment and to Preserve *Status Quo* filed with the Court on January 13, 1982.

3. As set forth in detail in the affidavits I have previously filed in this case, the Internal Revenue Service has complied with the revised injunctive orders entered by this Court. The Internal Revenue Service is taking no actions to restore the tax exempt status of any organization operating a private school

in Mississippi which had exempt status revoked as a result of failure to comply with the criteria of the orders entered in this case. Any requests for recognition of exempt status made by organizations operating a private school in Mississippi are being considered in accordance with the criteria of the orders entered in this case.

/s/ S. Allen Winborne
S. ALLEN WINBORNE

Subscribed and Sworn to before me this 21st day of January, 1982.

Judith O. Hinson
Notary Public

My commission expires January 31, 1986.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Defendants' Response to Plaintiffs' Motion to Vacate Stay of Proceedings, to Shorten Time for Response Hereto, and for Further Injunctive Relief to Enforce Declaratory Judgment and Preserve the *Status Quo* has been made this 25th day of January, 1982, by mailing a copy thereof to counsel for intervenors at the following addresses:

William Bentley Ball, Esquire
Philip J. Murren, Esquire
Ball & Skelly
511 North Second Street
P.O. Box 1108
Harrisburg, Pennsylvania 17108

Charles J. Steele, Esquire
James Edward Ablard, Esquire
Whiteford, Hart, Carmody & Wilson
1828 L Street, N.W.
Washington, D.C. 20036

By mailing a copy thereof to counsel for the plaintiffs at the following address:

William L. Robinson, Esquire
Norman J. Chachkin, Esquire
Frank P. Parker, Esquire
Lawyer's Committee for Civil
Rights Under Law
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005

And by mailing a copy thereof to the other counsel of record at the following address:

George S. Leonard, Esquire
206 N. Washington Street
Room 328
Alexandria, Virginia 22313

/s/ Donald J. Gavin
DONALD J. GAVIN

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 365807 788

Supplemental Brief

3

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE MOTION FOR
DIVIDED ARGUMENT OUT OF TIME AND
MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 38.4 and 42 of the Rules of this Court, the Solicitor General moves for leave to file a motion for divided argument out of time and moves for divided argument in the above-entitled cases.

The circumstances supporting our motion for leave to file this motion out of time are described in the detailed chronology of the developments in these cases set forth in our Motion for Leave to File Brief Out of Time.

The Brief for the United States that we seek leave to file out of time in these cases supports petitioners' argument that Section 501(c)(3) of the Internal Revenue Code does not authorize the Internal Revenue Service to deny them tax exempt status as "religious" or "educational" institutions because of their racially discriminatory policies. It therefore contends that the pertinent Revenue Rulings that were relied upon by the Commissioner of Internal Revenue to deny petititioners tax exempt status are based upon erroneous interpretations of the statute. However, the Brief for the United States opposes petitioners' constitutional claim that their First Amendment right to free religious belief and exercise guarantees them tax exempt status.

In light of the posture of the parties and the substantial public importance of the question presented, we agree with the suggestion of several amici curiae that the Court should appoint counsel to argue in support of the judgments below. Since the government is supporting petitioners' statutory claim but opposing petitioners' constitutional claim, we suggest that it would be appropriate to allot 20 minutes of oral argument time to petitioners, 20 minutes to the United States, and 20 minutes to counsel appointed by the Court to argue in support of the judgments below.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General */

FEBRUARY 1982

---

*/ The Solicitor General is disqualified in these cases.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

Pursuant to Rule 42 of the Rules of this Court, the Solicitor General respectfully moves for leave to file the Brief for the United States on the merits in the above-entitled cases out of time.

On October 13, 1981, the Court granted the petitions for writs of certiorari and consolidated the cases to consider the correctness of the court of appeals' decisions upholding Internal Revenue Service rulings that were applied to petitioners, because of certain racially discriminatory

practices, to deny them tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.).

On December 31, 1981, the Court granted our application for a ten-day extension of time to file our brief on the merits to and including January 10, 1982. By January 6, 1982, the government's brief had been prepared and was ready to be sent to the printer in order to meet the extended due date. That brief, however, was not filed. Instead, on January 8, 1982, we advised the Court in a Memorandum that since the filing of our brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to accord tax-exempt status to petitioners under Section 501(c)(3) of the Code, and to refund to them federal social security and unemployment taxes in dispute. We further advised the Court that the Treasury Department had commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners such tax exempt status. We therefore asked that the judgments of the court of appeals be vacated as moot.

Subsequently, on January 18, 1982, the President submitted proposed legislation to the Congress, which would give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-exempt status to private non-profit educational organizations with racially discriminatory policies. In a Supplemental Memorandum filed on February 4, 1982, we informed the Court of these developments, and appended thereto copies of the pertinent documents. Hearings on the President's legislative proposal were held by the Senate Finance Committee and the House Ways and Means Committee in early February 1982, and that proposal is now under advisement.

On February 18, 1982, the United States Court of Appeals for the District of Columbia Circuit in Wright v. Regan, No. 80-1124, pending on petition for a writ of certiorari, No. 81-970, directed the Secretary of the Treasury and the Commissioner of Internal Revenue "not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race see Runyon v. McCrary, 427 U.S. 160 (1976), by failing to maintain a 'racially nondiscriminatory policy as to students,' as that term is defined in the declaratory judgment in Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd mem. sub. nom. Coit v. Green, 404 U.S. 997 (1971)." A copy of that order is attached.

The District of Columbia Circuit's order in Wright changes the posture of these cases before the Court. In light of that court's order, the Secretary has determined not to grant or restore tax-exempt status to petitioners, or to revoke the pertinent Revenue Rulings, pending final disposition of these cases by this Court. Our previous suggestion of mootness is therefore no longer appropriate. In these circumstances, we believe it would be appropriate for this Court to proceed with adjudication of the issues on which certiorari was granted. We therefore seek leave to file our brief on the merits out of time. Copies of the brief will be filed and served in typescript this week, with printed copies to follow as soon as they are available.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General */

FEBRUARY 1982

---

*/ The Solicitor General is disqualified in these cases.

Appendix

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1124 September Term, 19 81

Inez Wright, individually and on behalf of her minor children, Oscar Clay Renfro, Anthony Lee Renfro, Lisa Marie Wright, and Ephron Antoni Wright, Jr., et al.,
Appellants

v.

Donald T. Regan, Secretary of the Treasury, et al.

Civil Action No. 76-1426

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 18 1982

GEORGE A. FISHER
CLERK

No. 82-1134

William H. Green, on his own behalf and on behalf of his minor children, et al.,
Appellants

v.

Donald T. Regan, as Secretary of the Treasury of the United States, et al.

Civil Action No. 69-01355

BEFORE: Wright, Tamm and Ginsburg, Circuit Judges

O R D E R

On consideration of movants' request for an injunction pending appeal in No. 82-1134, for an injunction under the "All Writs Act" to preserve the status quo and protect the potential effectiveness of this court's decision in No. 80-1124, and for consolidation of Nos. 82-1134 and 80-1124, it is hereby

ORDERED that the application to consolidate Nos. 82-1134 and 80-1124 is denied; and it is further

ORDERED that the motion for an injunction pending appeal in No. 82-1134 be referred forthwith to the motions panel for expeditious consideration; and it is further

No. 80-1124
82-1134

September Term, 19 81

ORDERED that the motion for relief under the "All Writs Act" in No. 80-1124 be filed and that a response thereto by the Secretary of the Treasury and the Commissioner of Internal Revenue be filed within fifteen days of the date of this order; and it is further

ORDERED, that to preserve the status quo pending response to the motion in No. 80-1124 and, thereafter, the court's determination of its authority to consider and decide the issues presented, see United States v. United Mine Workers, 330 U.S. 258 (1947), the Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, see Runyon v. McCrary, 427 U.S. 160 (1976), by failing to maintain a "racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment in Green v. Connally, 330 F.Supp. 1150, 1179 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

Per Curiam

Petitioner's Reply Brief

1

Office-Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

No. 81-3

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writs of Certiorari to the United States
Court of Appeals for the Fourth Circuit

MEMORANDUM:
RESPONDENT'S MOTION FOR DIVIDED ARGUMENT

At 11:40 a.m. today (February 24, 1982) through a third party, counsel for Bob Jones University became informed that the United States intends to file on February 24, 1982, a Motion For Divided Argument. Being unable to confirm this by a telephone call to the Department of Justice, and having received no copy of any such motion, or any communication concerning it, Bob Jones University feels it inappropriate to file a "Response to Motion", in that no such motion may have been made. It is nonetheless respectfully requested that this memorandum be treated as a response in opposition to that motion, should the motion have been filed, and

assuming that it contains the following two points:

1. That special counsel be appointed to present a brief and/or oral argument in this case.

2. That the time for oral argument be divided so as to allow twenty minutes for Bob Jones University and Goldsboro Christian Schools, twenty minutes for the United States, and twenty minutes for counsel to be appointed.

Bob Jones University would vigorously oppose the appointment of special counsel and the related division of oral argument.

I. THE APPOINTMENT OF SPECIAL COUNSEL WOULD BE UNWARRANTED AND IS PREJUDICIAL TO THE PETITIONERS HEREIN.

If, by its motion, the Government would support the conferring of intervenor status upon a non-party (whose attorney would then be permitted to present a brief and oral argument), by the general rule, intervention will not be granted a non-party at the Supreme Court level. Plainly, no non-party should be granted intervention here.

While, on rare occasions non-party intervention has been granted where loss of that party's rights have been threatened, no non-party in the present case has come forward whose own rights are threatened. Certainly the Court would not designate an individual or any organization to stand in the stead of the Government, as a private attorney general, purporting to represent a public interest in civil rights (which would, of absolute necessity, include religious civil rights). Essential would be a determination, based upon a record, that the non-party had standing to litigate the tax liability of a third party. Eastern Kentucky Welfare Rights Organization v. Simon, 426 U.S. 26 (1976). In the

absence of such a record, the Court would be asked to adjudicate the unsubstantiated claims of one, having no injury in fact to show, but merely ideological views, upon which to claim standing. See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., ___ U.S. ___, 50 U.S.L.W. 4103 (January 12, 1982).

Further, no precedent in the decisions of this Court exists to support non-party intervention. NAACP, in its Motion to Intervene, cites several cases to support its contention that intervention is necessary to protect its rights. Yet each case cited involves the significant difference that those parties granted intervention therein could all demonstrate concrete injury to themselves, rather than merely express "generalized grievances", Valley Forge Christian College, supra, 50 U.S.L.W. at 4106, about the matter in dispute. NAACP, et al., cannot demonstrate that denial of tax exemption to Bob Jones University will result in redress of any specific "injury in fact" which has occurred to it or its allied parties.

Certainly, too, the Court should not be asked to manufacture a case or controversy by choosing a party to advocate a particular point of view - most especially any individual or group which had not the remotest connection with the matter in question at any time heretofore. This case was, and remains, a challenge by two religious ministries to the United States for what those ministries believe to be an unfounded and unconstitutional application to them of a federal statute. The United States has conceded that indeed that application was unfounded, that is, without Congressional authorization or intendment. If the United States is now of the view that, if the application were well founded, that application would

not contravene the First Amendment, then the United States is quite capable of presenting that constitutional argument.

In the foregoing connection, two facts are obvious: (1) That if the opponent of Bob Jones University now concedes that it has no argument to make to oppose the University's contentions respecting lack of Congressional authority, a judgment of reversal is in order, and the Court ought not give ear to pleas that obstacles be devised to delay or impede the granting of that judgment. (2) That though the Congress did not authorize the actions taken by IRS herein (as the parties now agree), the matter is still one which the Congress is free to address.

For much the same reasons as appear above, no oral argument by counsel for an amicus curiae is warranted. Should, however, counsel for an amicus on one side of the issues in this case be heard, certainly counsel for amici such as the National Jewish Commission on Law and Public Affairs, the General Mennonite Conference, the Church of Jesus Christ of Latter-Day Saints, the United Presbyterian Church, American Baptist Churches, U.S.A., or other religious amici, should likewise be heard. These organizations, with their distinctive and deeply held commitments to religious principle as well as to religious liberty in a pluralistic society, have already informed this Court that they regard the Bob Jones University case as critically important religious civil rights litigation.

II. DIVIDED ARGUMENT IS NOT PROPER

Division of argument along the lines sought by the Government would severely prejudice the petitioner Bob Jones University. The United States seeks a total of 40 minutes

of time for presentation of argumentation adverse to the University, while allotting only half that amount to petitioners. It cannot be presumed that the United States will equally divide its time so as to devote identical portions in favor of petitioners' statutory position and opposed to petitioners' constitutional positions. The United States seeks an ultimate result unfavorable to the rights of petitioners, and should therefore not be permitted to take up time which should be reserved to the petitioners for defense of their rights. If one hour is to be set aside for argument, then petitioners should be granted one-half hour to argue.

Petitioner Bob Jones University has been informed by counsel for petitioner Goldsboro Christian Schools, Inc., that he will renew his previous motion (filed December 3, 1981) for additional time or, in the alternative, for divided argument. As before, petitioner Bob Jones University supports the granting of additional time - even though divided (counsel for Goldsboro Christian Schools being alloted fifteen minutes) - but opposes granting of division of the time already allotted.

Respectfully submitted,

William Bentley Ball

Philip J. Murren

Richard E. Connell

Kathleen A. O'Malley

BALL & SKELLY
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731

Attorneys for Petitioner
Bob Jones University

FEBRUARY 25, 1982

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 1982, a copy of Memorandum: Respondent's Motion For Divided Argument was mailed to each of the following:

Hon. Lawrence G. Wallace
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William G. McNairy, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard
P.O. Drawer U
Greensboro, NC 27402

William Bentley Ball

Petitioner's Reply Brief

2

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ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

No. 81-3

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION OF PETITIONER BOB JONES UNIVERSITY FOR ORDER DIRECTING RESPONDENT TO ACT WITH RESPECT TO RESPONDENT'S MEMORANDUM OF JANUARY 8, 1982

Movant, the petitioner Bob Jones University, hereby moves the Court to issue an appropriate order directing that the respondent inform the Court forthwith of the date upon which it will reinstate the tax-exempt status of Bob Jones University and the date upon which it will make refund of the taxes in dispute herein, or, in the alternative, notify the Court that it will seasonably file its brief in order that the case may proceed in regular course.

On October 13, 1981, the Supreme Court granted certiorari herein, thus apparently recognizing that the case presents issues of extreme weight nationally. Both the University and the Government, prior to the granting of certiorari, had urged that the case presents, in the words of the Government, "First Amendment questions of substantial importance", involving "the sensitivity of the claims that the Internal Revenue Service's administration of the tax laws violates the First Amendment right of schools to the free exercise of religion." (Brief For The United States, 16-17). The University's subsequent brief not only argued undeniably important Free Exercise claims, but contended that the application to its ministry of the Fourth Circuit's construction of Section 501(c)(3) was plainly violative of the Establishment Clause. At the threshold, however, the University made known to the Court that that construction misread the plain meaning of the statute, was completely contradicted by the legislative history, and actually excluded by the opinion of the district court in Green v. Connally. (Brief For Petitioner, Bob Jones University, 10-23).

With respect to the last-mentioned matter - lack of Congressional authority for the actions of IRS in the premises - the United States, on January 8, 1982, apprised the Court of a changed position. The Government's Memorandum of that date recited that the Department of the Treasury "has initiated the necessary steps" to reinstate the tax-exempt status of the University; that it "will refund. . . the. . . taxes in dispute"; and that it "has commenced the process necessary to revoke forthwith" the Revenue Rulings which had been relied on to deny the University tax-exempt status. The

Government asked that the judgments below be vacated as moot. In a White House news release of January 18, 1982, the Government's reason was stated: namely, that the IRS was without legislative authority for its actions (Supplemental Memorandum For The United States, 10a).

As of February 24, 1982 (44 days after January 8, 1982) the University's tax-exempt status has not been reinstated, no taxes refunded it, no communication sent it by the Government with respect to these obviously important matters, nor, so far as the University can ascertain, have any steps whatever been to taken in fulfillment of the Government's commitment. Thus the situation as of today is that, technically the case is not moot. Yet the United States has made a formal and public commitment to this Court that it is accomplishing the steps necessary to render it moot. There can be no doubt whatever, under the most familiar law respecting the "case or controversy" requirement of Article III, that the actual restoration of the University's tax-exempt status and refund of the taxes in dispute would render this case moot. Princeton University v. Schmid, ___ U.S. ___, 50 U.S.L.W. 4159 (January 13, 1982). The Government, having opened a question of mootness in this Court, should now be required to pursue the matter to conclusion forthwith, or to abandon it forthwith.

The orderly processes of this Court, as well as the rights of Bob Jones University, are severely prejudiced by the Government's continued delay in taking the steps which it pledged the Court to take. The University has been in litigation continuously, for a decade, in an effort to get a final answer to the question: Must a completely religious institution, which would not exist except for its religious mission, which receives no subsidy from government, which is

charged with the violation of no law, which poses no threat to the public safety, peace or order, and which is not charged with causing harm to any individual, be denied tax-exempt status solely because it follows a religious command (established upon the record, P A42) which requires it to forbid interracial dating and marriage?

Nothing has changed in the relative positions of the parties since the Court granted certiorari on October 13, 1981, and the extreme threat to Bob Jones University, posed by the decision of the Fourth Circuit, is as live as it was at that time. If the Government does not intend to take action to render this case moot, then this case is certainly ripe for determination and for that clear declaration of the rights involved which is needed for the avoidance of an endless vista, for this small school, of the anxieties and the drain of stewardship funds attendant upon further protraction of the litigation.*

---

* Comment to the press by attorneys for amici curiae herein has claimed that an order entered February 18, 1982, of the U.S. Court of Appeals for the District of Columbia Circuit in cases there pending known as Wright v. Regan (Ct. App. No. 80-1124 and Green v. Regan, (Ct. App. No. 82-1134) is applicable to Bob Jones University and would bar reinstatement of its tax-exempt status. (See Associated Press article, Philadelphia Inquirer, February 20, 1982, p. 1A and 4A). This claim is insupportable. Bob Jones University is not a party in either of the cases mentioned, and it would be a denial of fundamental due process for the Court of Appeals to adjudicate its rights in its absence. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327, n. 7 (1979). More importantly, the Court of Appeals relies upon Runyon v. McCrary 427 U.S. 160 (1976) as its authority. But in Runyon the Court stated that that case presented, no "question of the right of a private school to limit its student body to. . . adherents of a particular religious faith. . .", nor any question of the application of 42 U.S.C. §1981 "to private sectarian schools that practice racial discrimination on religious grounds." Id. at 167. (Emphasis by the Court). The Court noted that the Free

CONCLUSION

For all of the foregoing reasons, it is requested that this motion be granted.

Respectfully submitted,

William Bentley Ball
William Bentley Ball

Philip J. Murren
Philip J. Murren

Richard E. Connell
Richard E. Connell

Kathleen A. O'Malley
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Bob Jones University

FEBRUARY 24, 1982

Footnote continued from previous page:

Exercise Clause of the First Amendment was in no way involved. Ibid. fn. 6. Additionally, the Court of Appeals order cites Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd. mem. sub nom. Coit v. Green, 404 U.S. 997 (1971) as the source of its definition of "racially discriminatory policy as to students", but the Green opinion, as petitioner has pointed out, expressly disclaimed any application to religious schools. (Green, at 1169, and see Brief For Petitioner, Bob Jones University, 17). The Court of Appeals' order of February 18, 1982, can therefore be no bar to reinstatement of the University's exemption.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1982, a copy of Motion of Petitioner Bob Jones University For Order Directing Respondent to Act With Respect to Respondent's Memorandum of January 8, 1982, was mailed to each of the following:

Hon. Lawrence G. Wallace
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William G. McNairy, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard
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Greensboro, NC 27402

William Bentley Ball

William Bentley Ball

Petitioner's Reply Brief

Office - Supreme Court, U.S.
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No. 81-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER GOLDSBORO CHRISTIAN SCHOOLS, INC.

WILLIAM G. MCNAIRY*
CLAUDE C. PIERCE
EDWARD C. WINSLOW
JOHN H. SMALL
S. LEIGH RODENBOUGH IV
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SUMMARY OF ARGUMENT

The exclusive authority to amend the requirements for qualification as a tax-exempt educational organization resides with Congress and not the executive branch. In addition, the "frustration of public policy" doctrine first enunciated in *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958), does not require the denial of tax-exempt status to Petitioner Goldsboro Christian Schools, Inc. (hereinafter "Goldsboro"). Finally, the extension of tax-exempt status to Goldsboro is not barred by the equal protection component of the Fifth Amendment.

ARGUMENT

I. ANY CHANGE IN THE REQUIREMENTS FOR QUALIFICATION AS A TAX-EXEMPT EDUCATIONAL ORGANIZATION UNDER SECTION 501(c)(3) MUST BE MADE BY CONGRESS.

Goldsboro satisfies each requirement for qualification as a tax-exempt educational organization under Section 501(c)(3). Assuming *arguendo* that the statute incorporates the common law of charitable trusts, Goldsboro provides a "public benefit" and thus qualifies as a common law charity. Moreover, Congress has never ratified the IRS's denial of tax-exempt status to schools which, like Goldsboro, maintain racially discriminatory policies. Finally, only Congress, and not the IRS, has the authority to amend the requirements for qualifying as a tax-exempt educational organization.

Amicus Curiae Coleman (hereinafter "Coleman") argues at length that Section 501(c)(3) incorporates the common law of charitable trusts. Coleman Br. at 24-28. Coleman then argues that Goldsboro should be denied tax-exempt status under that common law doctrine because its racially discriminatory admissions policy is violative of "a clear federal public policy condemning racial discrimination in education." Coleman Br.

at 40.[1] The contentions made by Coleman are not supported by either the languge of Section 501(c)(3) or its legislative history. *See* Goldsboro Br. at 10-24. Moreover, even assuming *arguendo* that Congress intended to weave the common law of charitable trusts into Section 501(c)(3), Coleman's application of the standard to be followed at common law is misguided.

Goldsboro agrees with Coleman that an organization must provide some "public benefit" in order to qualify as charitable at common law. Coleman Br. at 26-27. Goldsboro also agrees with Coleman that an obvious corollary of this "public benefit" standard is that "the *purpose* of a charitable trust, educational or otherwise, may not be unlawful or against public policy." Coleman Br. at 28 (emphasis added). Indeed, this corollary has been uniformly recognized by both the commentators, *see, e.g.*, 4 A. Scott, *The Law of Trusts* § 377 (3d ed. 1967), and the courts, *see, e.g.*, *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1877). The focus of this corollary, however, is on the "purpose" of the organization rather than on some policy of the organization incidental to the fulfillment of that purpose. *See Girard Trust Co.* v. *Commissioner*, 122 F.2d 108, 110 (3d Cir. 1941).

The now infamous Fagin's school for pickpockets, of course, does not qualify as a charitable organization under this standard because the *purpose* of the organization—to educate young boys in the fine art of picking pockets—flies in the face of a public policy that no doubt has been incorporated into the criminal code of every culture since the beginning of civilization.

The *purpose* of Goldsboro, on the other hand, is "to conduct an institution or institutions of learning for the general education of *Youth* in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and

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[1] Federal policy with respect to racial discrimination, however, is anything but "clear" in the context of sectarian schools that practice racial discrimination on the basis of their sincerely held religious beliefs. *See* Goldsboro Br. at 38-41.

the ethics revealed in the Holy scriptures." (J.A. 6). This laudable purpose has been fulfilled by a school that maintains a regularly enrolled student body for kindergarten and grades one through twelve of approximately 750 students. (J.A. 6). In addition, throughout the tax years in question in this case, Goldsboro was certified by the North Carolina Department of Public Instruction as an "approved nonpublic school" which met the requirements of N.C. Gen. Stat. § 115-255. (J.A. 7). Clearly, Goldsboro satisfies the threshold requirement of providing that degree of "public benefit" or good to humanity necessary to qualify as a common law charity.

The "public benefit" resulting from Goldsboro's educational *purpose* is not destroyed by its incidental practice of racial discrimination in admissions. This point can best be illustrated by analogy. The Catholic Church is inalterably opposed to abortions. Federal public policy on this subject, as defined in *Roe* v. *Wade*, 410 U.S. 113 (1973), is just the opposite—a woman, in certain circumstances, has a constitutional right to an abortion if she so desires. Yet if a Catholic hospital refuses to permit abortions to be performed in its operating rooms, would the hospital lose its status as a common law charity because its policy on abortions violates federal public policy? The answer must be in the negative. Even though the hospital refuses to comply with federal public policy on abortions, it nevertheless qualifies as a charitable organization because of the obvious public benefit that arises from its care for the sick and infirm.

This distinction between "public policy" and "public benefit" was recognized many years ago by the Court of Appeals for the District of Columbia in *Pennsylvania Co. for Insurance on Lives and Granting of Annuities* v. *Helvering*, 66 F.2d 284 (D.C.Cir. 1933). In that case the government argued that a bequest to the American Anti-Vivisection Society of Philadelphia could not be treated as "charitable" because the tenets of the organization were in opposition to the governmentally approved practice of vivisection. In rejecting this proposition, the court stated:

> We are asked . . . to take judicial notice of the fact that the government itself approves the practice of vivisection in the interest of the public health . . . . But this . . . does not mean that we must condemn as outlaws those of contrary view. The question is not so narrow as this. The test is rather whether in the manner of the pursuit of the object sought by those associated in the society some good to humanity may not result.

Id. at 288-89. Similarly, the widespread condemnation of the racially discriminatory admissions policy followed by Goldsboro does not invalidate its qualification as a common law charity. If compliance with the majority view were a condition of tax-exempt status, the government would destroy the pluralism that the concept of common law charity, as well as Section 501(c)(3), is designed to foster. Whether Goldsboro should, nevertheless, be denied tax-exempt status because its admissions policy conflicts with federal public policy is a matter that should be left to Congress.[2]

Contrary to the assertion of Coleman, Congress has never explicitly ratified or approved the actions of the IRS with respect to the denial of tax-exempt status to racially discriminatory schools. Coleman attributes great significance to the eleven bills that have been introduced in Congress in an

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[2] Indeed, in its promulgation of Rev. Rul. 71-447, 1971-2 C.B. 230, and Rev. Rul. 75-231, 1975-1 C.B. 158, the IRS has resolved not one, but two, controversial social and political issues. First, in concluding that there is a federal public policy against the practice of racial discrimination by sectarian schools on the basis of their sincerely held religious beliefs, the IRS has ventured beyond its area of expertise to perform a delicate balancing of the First Amendment, on the one hand, and civil rights legislation born out of various constitutional provisions on the other. Second, the Service has proceeded outside its authority to determine that tax-exempt status should be denied to sectarian schools that practice racial discrimination. In resolving the first issue, the IRS has usurped the authority of the legislative and judicial branches to define federal public policy, and, in resolving the second issue, the IRS has effectively amended Section 501(c)(3)—a step only Congress can take.

effort to overturn the IRS's construction of Section 501(c)(3). Coleman Br. at 48. These ill-fated efforts, however, should carry little weight in this Court. In the leading decision on the subject of congressional ratification, this Court opined that "unsuccessful attempts at legislation are *not* the best of guides to legislative intent." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n. 11 (1969) (emphasis added). *See also Waterman Steamship Corp.* v. *United States*, 381 U.S. 252, 269 (1965); *United States* v. *Wise*, 370 U.S. 405, 411 (1962).

Moreover, Coleman fails to mention the countervailing, and far more significant, failure of Congress to enact legislation affirming the IRS's position. On January 18, 1982, President Reagan forwarded to Congress a proposed bill to prohibit the granting of tax-exempt status to organizations maintaining schools with racially discriminatory policies, together with a letter urging prompt passage of the bill. Supp. Mem. of U.S. at 6a-11a. Congress received this bill at a time when the decision of the government to revoke Rev. Ruls. 71-447 and 75-231 had provoked great debate, both among the public and in Congress, about the propriety of denying tax-exempt status to racially discriminatory private schools. Congress' failure to take any action on this proposed legislation, therefore, speaks far more about congressional intent than the consideration of previous bills by no more than a congressional committee.

Coleman also relies on Congress' 1976 enactment of Section 501(i), Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697, as evidence of congressional approval of the IRS's treatment of racially discriminatory schools. Coleman Br. at 50-51. This amendment served only to deny tax-exempt status to social clubs otherwise entitled to exemption under Section 501(c)(7). Yet, Coleman finds in it congressional affirmation of the IRS policy now before this Court in a footnote reference to this Court's decision in *Coit* v. *Green* 404 U.S. 997 (1971) in the Senate Report, S. Rep. No. 94-1318, 94th Cong., 2d Sess. 8 (1976), *reprinted in* [1976] U.S. Cong. & Ad. News 6051. To the extent that this reference reflects anything more than simple awareness of, without reliance on, *Coit* v. *Green*, it is unfound-

ed because, at the time of the enactment of Section 501(i), this Court had already stated that its "affirmance in *Green* lacks the precedential weight of a case involving a truly adversary controversy." *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n. 11 (1974). Therefore, the passage of Section 501(i) has absolutely no bearing on the separate issue of whether the IRS has the authority to deny tax-exempt status to racially discriminatory private schools.

Remarkably, Coleman finds congressional approval of Rev. Ruls. 71-447 and 75-231 in even the Dornan and Ashbrook Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979). Coleman points to statements made by the congressional sponsors of the amendments concerning their prospective effect as evidence of congressional acquiescence in the action of the IRS prior to the formulation of its proposed procedures. Coleman Br. at 53-54. This argument is clearly disingenuous because the statements cited by Coleman reflect nothing more than a desire to maintain the status quo pending congressional consideration of the existing IRS revenue rulings. The statements in no way indicate approval of the existing rulings by the congressional sponsors of the Dornan and Ashbrook Amendments.

Indeed, in the course of congressional debate on the amendments, Congressman Dornan stated that the position of the IRS "flies in the face of original congressional intent." 125 Cong. Rec. H5980 (daily ed. July 16, 1979). In a speech preceding the vote on the Ashbrook and Dornan Amendment extensions, Congressman Ashbrook similarly concluded that Section 501(c)(3) made no provision for the denial of tax-exempt status to racially discriminatory private schools. *See* 126 Cong. Rec. H5200 (daily ed. June 18, 1980). Finally, Senator Helms, who introduced the Dornan Amendment in the Senate, stated that "the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code." 125 Cong. Rec. S11835 (daily ed. Sept. 5, 1979).

Moreover, while Coleman argues that the legislative history of the Ashbrook and Dornan Amendments "reflects overwhelming congressional support, across a remarkably broad spectrum, for the IRS's continued authority to deny tax exemptions to schools engaged in racial discrimination," Coleman Br. at 54, every remark in favor of the IRS's position cited by Coleman can be countered by an equally eloquent and compelling remark in opposition to that position.[3] Thus, a review of the congressional response to the decision of the IRS to deny tax-exempt status to racially discriminatory private schools reveals a Congress deeply torn over an issue of enormous complexity and volatility.

This raging congressional debate makes such cases as *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981), *Haig* v. *Agee*, 453 U.S. 280 (1981), and *United States* v. *Rutherford*, 442 U.S. 544 (1979), inapposite because ratification arose in those cases out of complete silence and total inaction on the part of Congress. Moreover, unlike those cases, in the present case the only legislation to be passed into law as a result of Congress' examination of the questioned agency interpretation—the Dornan and Ashbrook Amendments—served to curb further implementation of the interpretation. Indeed, were this Court to find congressional ratification in the present case, it would effectively make the executive branch the tie-breaker on any issue over which Congress was divided.

In addition, the agency interpretations considered in *CBS, Inc.*, *Agee* and *Rutherford* were rendered with respect to

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[3] *See, e.g.*, 125 Cong. Rec. H5981 (daily ed. July 16, 1979) (remarks of Congressman Crane); 125 Cong. Rec. H5982 (daily ed. July 16, 1979) (remarks of Congressman Goldwater); 125 Cong. Rec. H5884 (daily ed. July 13, 1979) (remarks of Congressman Grassley); 125 Cong. Rec. H5885 (daily ed. July 13, 1979) (remarks of Congressman Duncan) (statement inserted in the record); 125 Cong. Rec. S11837 (daily ed. Sept. 5, 1979) (remarks of Senator Thurmond); 125 Cong. Rec. S11852 (daily ed. Sept. 5, 1979) (remarks of Senator Stennis) (statement inserted in the record).

issues squarely within the expertise of the respective agencies. In stark contrast, the IRS in the present case has proceeded far afield of its revenue collecting expertise to render an interpretation resolving complex considerations of both constitutional law and civil rights legislation that finds no support in the plain language of a tax statute. Therefore, the ratification cases relied upon by Coleman have no application in the present case.

The plain language of Section 501(c)(3) makes no provision for the denial of tax-exempt status to private schools that discriminate on the basis of race. While the imposition of this additional requirement for tax-exempt status may or may not be a wise one, the decision on that issue lies outside the province of the IRS. Instead, the task is one to be undertaken by Congress, and this Court has consistently recognized that fact. *See, e.g., United States* v. *Larionoff*, 431 U.S. 864, 873 n. 12 (1977); *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134-35 (1936). This axiom should apply with especial force in a case such as the present one, which involves a delicate balancing of competing social values.

By the same token, under the constitutional concept of the separation of powers, it is not up to this Court to remedy what it perceives to be the shortcomings of Congress. The Chief Justice succinctly stated this proposition in *Plyler* v. *Doe*, 457 U.S. ____, ____, 102 S.Ct. 2382, 2413 (1982) (dissenting opinion):

> The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy.

(Citations omitted). That the grant or denial of tax-exempt status to racially discriminatory private schools, may, and

probably will, have far-reaching social consequences, places this controversial issue squarely in the lap of Congress. As this Court recognized in *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272 (1979), "[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."

Moreover, this responsibility is one that Congress in the past has readily accepted with respect to the denial of tax-exempt status. Upon Congress' determination that certain Communist organizations were inimical to the preservation of our form of government, it acted to deny those organizations tax-exempt status. The mechanism for this action, however, was the enactment of a provision in the Internal Security Act of 1950, which is now codified as 50 U.S.C. § 790, denying tax-exempt status to any organization registered as a Communist organization or determined by the Subversive Activities Control Board to be a Communist-action, Communist-front, or Communist-infiltrated organization. This provision was later incorporated by a cross-reference in the Internal Revenue Code of 1954, which is now codified as 26 U.S.C. § 501(j). Thus, Congress directed the IRS to deny tax-exempt status to such organizations and left the internal security aspect of its decision to an administrative agency with expertise in that area. A similar course may be chosen with respect to racially discriminatory private schools. That choice, however, is one that Congress, and not the IRS or this Court, must make.

II. THE "FRUSTRATION OF PUBLIC POLICY" DOCTRINE DOES NOT REQUIRE THE DENIAL OF TAX-EXEMPT STATUS TO GOLDSBORO.

Coleman argues that the extension of tax-exempt status to Goldsboro violates the "frustration of public policy" doctrine delineated by this Court in *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958). That doctrine, however, is a narrow one that this Court has never applied in cases analogous to the present one. More importantly, even were the doctrine applicable in the present context, it would not compel the denial of tax-exempt status to Goldsboro.

In *Tank Truck*, this Court refused to permit a taxpayer to deduct, as an ordinary and necessary business expense, fines paid for violating state maximum weight laws on public highways. The Court reasoned that the allowance of such a deduction would frustrate the public policy underlying the maximum weight laws by softening the punitive impact of the fines imposed for the violations. *Id.* at 35. This Court stated that it would "not presume that Congress, *in allowing deductions* for income tax purposes, intended to encourage a *business enterprise* to violate the declared policy of a State." *Id.* (emphasis added).

In *Commissioner* v. *Sullivan*, 356 U.S. 27 (1958), a companion case to *Tank Truck*, this Court considered the question of whether business expenses, such as wages and rent, incurred by a taxpayer in conducting an illegal gambling enterprise were deductible as ordinary and necessary business expenses. Even though the gambling activity engaged in by the taxpayer violated the criminal law and was clearly against public policy, the Court nevertheless held the expenses to be deductible, stating that the allowance of the wages and rent as deductions was not a "device to avoid the consequences of violation of the [gambling laws]." *Id.* at 29.

Coleman urges the Court to extend the *Tank Truck* doctrine to the determination of an organization's tax-exempt status, stating that "*Tank Truck* was not simply an interpretation of the deduction for 'ordinary and necessary' business expenses allowed under § 162 of the Code," but rather a broad-based proscription against the extension of tax benefits to any individual or entity that violates some public policy. Coleman Br. at 45. This proposition, however, finds no support in either *Tank Truck* itself or the other decisions in which this Court has considered the doctrine.

This Court has considered the *Tank Truck* doctrine only in cases involving the deductibility of business expenses. *See, e.g.*, *Commissioner* v. *Tellier*, 383 U.S. 687 (1966); *Hoover Motor Express Co.* v. *United States*, 356 U.S. 38 (1958); *Lilly*

v. *Commissioner*, 343 U.S. 90 (1952); *Commissioner* v. *Heininger*, 320 U.S. 467 (1943). Moreover, in *Tank Truck* and the other business expense deduction cases in which this Court has applied the doctrine, it has served to prevent an unintentioned reduction in the severity of the financial penalty imposed upon a wrongdoer by *some other state or federal law*. If applied to deny tax-exempt status, however, the doctrine would make the taxation imposed by the Internal Revenue Code the financial penalty. That result would violate the maxim laid down by this Court in *Commissioner* v. *Tellier*, 383 U.S. at 691, that "the federal income tax is . . . not a sanction against wrongdoing."

Furthermore, if the *Tank Truck* doctrine were to be applied to deny Goldsboro tax-exempt status, Goldsboro would then be subject to the federal income tax imposed on corporations. Goldsboro would receive tax benefits from deducting business expenses such as teacher salaries and from taking investment tax credits for the purchase of equipment such as buses. Coleman's argument taken to its logical conclusion would also require the denial of those tax benefits. Thus, Goldsboro would be subject to tax on its gross income. Neither this Court nor any other court has ever imposed such a penalty. In fact, such a result was clearly rejected by this Court in *Sullivan* and *Tellier*. Accordingly, the frustration of public policy doctrine should be left in the business expense deduction setting for which it was formulated.

In addition to considering the *Tank Truck* doctrine only in cases involving a business expense deduction, this Court has applied this doctrine only when the deduction would frustrate some public policy that has been "sharply defined" in a *criminal or punitive statute*. *See, e.g., Hoover Motor Express Co.* v. *United States*, 356 U.S. at 39; *Tank Truck*, 356 U.S. at 34. Even in the lower court cases cited by Coleman, the taxpayer's action had violated some public policy defined in a criminal statute. *Holt* v. *Commissioner*, 69 T.C. 75 (1977), *aff'd*, 611 F.2d 1160 (5th Cir. 1980) (importation, distribution and sale of marijuana); *Mazzei* v. *Commissioner*, 61 T.C. 497 (1974)

(counterfeiting); *Turnipseed* v. *Commissioner*, 27 T.C. 758 (1957) (adulterous cohabitation).

Congress has similarly circumscribed the scope of the *Tank Truck* doctrine. In its 1969 and 1971 amendments to Section 162, Congress confined the doctrine to fines paid for violations of law and to illegal bribes, kickbacks and similar payments. *See* 26 U.S.C. § 162(c) & (f).

Goldsboro clearly has not violated any criminal provision. Indeed, the IRS, in the very revenue ruling on which Coleman places such great reliance, has conceded that "the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law." Rev. Rul. 71-447, 1971-2 C.B. 230. Therefore, this Court should not apply the *Tank Truck* doctrine in this case.

Even if the *Tank Truck* doctrine is applicable in the present case, it does not support the denial of tax-exempt status to Goldsboro. Two conditions must be present before the "frustration of public policy" doctrine is applicable. First, a tax benefit may be denied only "if allowance of the [tax benefit] would frustrate sharply defined national or state policies proscribing particular types of conduct." *Tank Truck*, 356 U.S. at 33. There is no "sharply defined" public policy proscribing sectarian schools that discriminate on the basis of sincerely held religious beliefs. *See* Goldsboro Br. at 38-41.

Second, the allowance of the tax benefit must cause severe and immediate frustration of the sharply defined public policy. *See, e.g.*, *Commissioner* v. *Tellier*, 383 U.S. at 694; *Tank Truck*, 356 U.S. at 35. Unlike the tax deduction that was denied in *Tank Truck*, however, tax-exempt status would not be given to Goldsboro in return for or as a result of its racially discriminatory admissions policy—the conduct that Coleman argues violates public policy. Under Coleman's argument, Goldsboro's adherence to its racially discriminatory admissions policy would be more comparable to the operation of the illegal gambling enterprise considered in *Sullivan*, in which the gambling activities were clearly contrary to public policy.

But in that case, this Court nevertheless permitted the deduction of the business expenses incurred in the course of those activities. If Goldsboro were to be denied tax-exempt status, then it clearly could deduct wages and other operating expenses under *Sullivan*. There is no distinction, from a policy standpoint, between permitting Goldsboro to take business expense deductions and granting it tax-exempt status. Neither tax deductions, tax credits, nor tax exemptions cause severe and immediate frustration of any public policy against racial discrimination.

Moreover, as the district court noted in *Bob Jones University* v. *United States*, 468 F. Supp. 890, 903 (D.S.C. 1978), the petitioners' racial views result from their immutable religious beliefs and therefore are not encouraged by the extension to them of tax-exempt status. Thus, it must be concluded that there is no nexus between the benefit that Goldsboro derives from tax-exempt status and any public policy against racial discrimination.

III. THE FIFTH AMENDMENT DOES NOT BAR THE EXTENSION OF TAX-EXEMPT STATUS TO GOLDSBORO.

The extension of tax-exempt status to Goldsboro under Section 501(c)(3) does not violate the equal protection component of the Fifth Amendment that this Court has applied to prohibit "state action" on the part of the federal government in such cases as *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, it is not unconstitutional to afford racially discriminatory schools tax-exempt status under Section 501(c)(3).[4]

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[4] This Court should not, however, even consider the Fifth Amendment contentions of Coleman because those contentions are raised for the first time in this Court. In No. 81-1, the United States stated in its brief to the district court that "the tax benefits attendant upon qualification as a Section 501(c)(3) organization do not constitute such federal financial expenditures as to be subject to constitutional limitations or limitations upon expenditures by Title VI of the Civil

Coleman argues that granting tax-exempt status to Goldsboro constitutes impermissible government aid under this Court's decision in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). He emphasizes the economic equivalency of direct subsidies and tax exemptions. Coleman Br. at 58-59. This argument, however, misses the mark; the fact that the extension of tax-exempt status produces an economic benefit to Goldsboro does not establish "state action."

The concept of "state action" does not outlaw the extension of every benefit or service provided by a government to a racially discriminatory entity. Rather, as this Court noted in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), the relevant inquiry is whether the state has "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a *joint participant* in the challenged activity." (Emphasis added). Thus, this Court has recognized that, unless the doctrine of "state action" is to be applied to the actions of virtually every individual and entity in this day of pervasive governmental influence and regulation, it must draw a line between that governmental conduct which is so tangible and significant that the state must be regarded as a supporter of private conduct and that governmental assistance which is so indirect and remote that it

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Rights Act of 1964." Brief of United States in Support of Motion for Partial Summary Judgment at 26 n.10, *Goldsboro Christian Schools, Inc.* v. *United States*, 436 F.Supp. 1314 (E.D.N.C. 1977). Based upon this disclaimer, neither Goldsboro nor the United States has made any argument that the Constitution compels the denial of tax-exempt status either in the courts below or in the briefs filed on petition for writ of certiorari to this Court. Under Supreme Court Rule 34.1(a), a "brief may not raise additional questions or change the substance of the questions already presented" in the petition for writ of certiorari. Accordingly, this Court has refused to consider constitutional claims raised for the first time in a brief filed in this Court. *See, e.g., Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975).

does not place the mantle of governmental authorization on the private conduct. *See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173-76 (1972).

This Court should draw that line between tax exemptions, which "constitute mere passive state involvement," and the "affirmative involvement characteristic of outright governmental subsidy." *Walz* v. *Tax Commission*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring). The decisive difference between tax exemptions and direct subsidies has been eloquently stated by Justice Brennan in his oft-quoted concurring opinion in *Walz*, *id.* at 690:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfers. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

This Court recognized a similar dividing line in both *Norwood* v. *Harrison*, 413 U.S. at 465, and *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 568 (1974), when it required a showing of "tangible financial assistance" and excepted from that standard "generalized services government might provide . . . in common with others" such as police and fire protection. The extension of tax-exempt status clearly falls within this exception because, as Professor Boris I. Bittker has noted, so-called "tax subsidies," such as tax exemptions, "are as ubiquitous as fire and police protection." Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 68 (1972).

Indeed, given the universality of the tax benefits that might otherwise be regarded as impermissible state aid to discrimination and the several forms of discrimination prohibited by the Fifth Amendment, a line drawn to exclude all forms of tax benefits from the prohibitions of the Fifth Amendment is

essential. If the line is not drawn at that point, no principled distinction can be drawn between the extension of tax-exempt status to Goldsboro and the bestowal of any other tax benefit provided by the Internal Revenue Code upon any other taxpayer or between race discrimination and the other forms of discrimination prohibited by the Equal Protection Clause. For example, an insurance company that discriminates on the basis of wealth by denying coverage to any person below a certain income level would be denied any business expense deduction; a farmer's cooperative that discriminates on the basis of national origin by denying membership to persons of a particular ethnic group would lose that status; a mutual savings bank that discriminates on the basis of sex in its hiring practices would be denied the tax benefits granted to banking institutions under Subchapter H of the Code; and the private school in Texas that denies admission to alien children would be denied tax-exempt status.

Moreover, the taxpayer who discriminates would be denied all benefits to which it would otherwise be entitled under the Internal Revenue Code. For examp' were Goldsboro denied tax-exempt status on Fifth Amendment grounds, and thereby subjected to taxation as a corporation, could it then claim an investment tax credit on the purchase of buses? The logical extension of the denial of tax-exempt status to Goldsboro on Fifth Amendment grounds would compel an affirmative answer to this question because an investment tax credit would be a more direct benefit to Goldsboro than the extension of tax-exempt status is now. While these examples are frightening, they are but the thin edge of the wedge for "the Internal Revenue Code is a pudding with plums for everyone," Bittker & Kaufman, *supra*, at 86, and the forms of discrimination prohibited by this Court are many. In fact, the incorporation of the equal protection component of the Fifth Amendment into the Internal Revenue Code would make the conduct of any private entity, including an individual taxpayer, "state action" subject to review by this Court.

Coleman attempts to minimize the far-reaching effect of any decision premised on Fifth Amendment grounds. First, he attempts to distinguish the Section 501(c)(3) exemption from other tax benefits, such as business expense deductions, on the ground that the former carries with it the imprimatur of governmental approval while the latter is merely a "neutral measurement of income . . . whose availability does not imply that the taxpayer measures up to a public interest standard of any sort." Coleman Br. at 62. This distinction, however, is a specious one. As one commentator has noted,

> [t]he government "approval" of the tax exempt organization does not necessarily indicate government approval of the discriminatory practice. The grant of § 501(c)(3) status is a recognition that the organization satisfies the requirements of being religious, charitable, or educational; it does not represent affirmative government approval of all aspects of the organization's programs.

Note, *The Internal Revenue Service's Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 Notre Dame Law. 925, 937 (1979); *accord*, Bittker & Kaufman, *supra*, at 71. Indeed, the extension of tax-exempt status by the IRS no more indicates governmental approval of Goldsboro's admissions policies than it does governmental approval of a church's theology, a hospital's abortion policy or a school's curriculum.

Moreover, the distinction between various types of tax benefits on the basis of whether they constitute nothing more than a "neutral measurement of income" would leave such taxpayers as insurance companies, mutual savings banks, real estate investment trusts, Subchapter S corporations, cooperatives, farmers, qualified pension plans and underdeveloped-country corporations subject to the strictures of the Fifth Amendment because those taxpayers all benefit from tax statutes designed to do more than merely measure income. *See* Bittker & Kaufman, *supra*, at 73. Even the example of business expense deductions relied upon by Coleman is a poorly chosen one. The allowance of a business expense deduction is conditioned on a finding that that deduction does not frustrate

any sharply defined public policy. *See Tank Truck*, 356 U.S. at 33. Therefore, any recipient of a business expense deduction has clearly received a stamp of government approval according to the analysis suggested by Coleman.

Second, Coleman asserts that racial discrimination and tax-exempt status should be carved out of the Fifth Amendment for special treatment and that "other forms of discrimination or other deductions or exemptions" can then be determined on a case-by-case basis. Coleman Br. at 62. Yet he has not offered this Court any principled basis on which to make any distinction between racial discrimination and other forms of discrimination or between tax-exempt status and other tax deductions and exemptions. This failure is certainly not an oversight. At the very least, any decision premised upon the Fifth Amendment in the present case would apply in the context of gender-based discrimination because "[c]lassifications based upon gender, not unlike those based upon race," have been viewed with a jaundiced eye by this Court. *Personnel Administrator* v. *Feeney*, 442 U.S. at 273. Moreover, the case-by-case approach suggested by Coleman is inappropriate "[f]or in the long run constitutional adjudication that is premised on a case-by-case appraisal . . . cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause." *Rogers* v. *Lodge*, 458 U.S. ____, ____, 102 S.Ct. 3272, 3289 (1982) (Stevens, J., dissenting).

Accordingly, the efforts of Coleman to confine any decision based on the Fifth Amendment to racial discrimination practiced by organizations that have acquired tax-exempt status under Section 501(c)(3) ultimately come to naught. Therefore, this Court must consider the far-reaching consequences that any decision premised on the Fifth Amendment would have. The contemplation of that prospect compels the drawing of a line that leaves unconstitutional "state action" on one side and any tax benefit arising under the Internal Revenue Code on the other.

CONCLUSION

For the foregoing reasons the judgment of the Fourth Circuit should be reversed; this case should be remanded to the Fourth Circuit with directions to remand it to the district court for the entry of summary judgment in favor of Goldsboro on the issue of its qualification as a tax-exempt educational organization under Section 501(c)(3).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The United States believes resolutely that Congress ought to deny tax-exempt status to any educational institution that pursues a racially discriminatory policy.[1] The overriding national commitment to the eradication from American society of differences in the treatment of individuals based solely on race or color is especially strong in the field of education, where racial discrimina-

[1] The President early this year sent to both Houses of Congress legislation that would require such a result. See Senate Bill, S. 2024, 97th Cong., 2d Sess. (1982); House Bill, H.R. 5313, 97th Cong., 2d Sess. (1982).

tion has long been condemned by this Court, by the Congress, and by all elements of the Executive Branch.

The Government's position in this case signals no compromise of this fundamental principle of nondiscrimination in matters of race. Rather, it rests on the equally fundamental tenet that Congress—not the courts or the Executive Branch—has exclusive authority, and responsibility, under Article I of the United States Constitution to legislate. While we think Congress *should* by law authorize the IRS to deny tax exemptions to racially segregated schools, nowhere in the Internal Revenue Code (or elsewhere) has it done so. And, in the absence of such a legislative mandate, the result desired—no matter how much desired—cannot constitutionally be accomplished by either judicial or administrative action.

At the center of the present controversy is § 501(c)(3) of the Code, which *amicus curiae* William T. Coleman, Jr. ("Amicus") argues can be construed to permit IRS denials of tax exemptions to petitioners and other *bona fide* educational institutions that engage in racially discriminatory practices. We argued in our main brief ("Br.") that such a construction of § 501(c)(3) is contrary to both its language and its legislative history, and flies in the face of many years of administrative interpretation by those charged with implementing the Code. This reply will be limited to supplementing those earlier remarks only to the extent necessary to respond to specific points relied upon by Amicus.

A. Understandably, Amicus does not argue that Congress intended specifically to deny tax-exempt status to racially discriminatory private schools. Such an argument is foreclosed by American history; the statutory exemption for educational institutions was initially enacted at the turn of the century,[2] a time when—as Amicus

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[2] Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. The intent of the 1913 Congress, of course, forms the core of the question of statutory interpretation at issue in this case. See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472 (1979) (construing § 501(c)(6)).

readily acknowledges (A. Br. 43-44)—racial segregation in education and other pursuits was widespread and in many places legally required.[3]

Rather, Amicus maintains that Congress intended to accord tax-exempt status only to organizations satisfying the requirements of a "charity" at common law. Thus, notwithstanding the carefully disjunctive statutory enumeration in § 501(c)(3) of eight discrete purposes qualifying for exemption, it is Amicus' thesis that Congress intended *any* organization devoted to "purposes beneficial to the community" (A. Br. 19-20, quoting *Commissioners* v. *Pemsel*, [1891] A.C. 531, 583) to be exempt, provided that—in the common-law sense of "charitable"—the organization engages in no practices that are illegal or inconsistent with public policy. On this reasoning, the other seven separately enumerated exempt purposes—five of which were specifically added by different amendments to the statute—are said to be subsumed within the operative term "charitable," and, in Amicus' view, are merely intended as "illustrative examples" of purposes beneficial to the community (A. Br. 18-24, 35-40).

Amicus' theory thus attributes to Congress the highly improbable intention of "vesting in the Commissioner virtually plenipotentiary power over philanthropic organizations" (*Commissioner* v. *"Americans United," Inc.*, 416 U.S. 752, 773 (1974) (Blackmun, J., dissenting)), by authorizing him not only to determine which purposes are "beneficial to the community," but also to divine "public policy" and to police exemptions accordingly. Moreover, it drains all independent legal significance from seven of the eight separately enumerated exempt pur-

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[3] The exemption for educational institutions now contained in § 501(c)(3) first appeared in 1894, two years before the Court's decision in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). See Tariff Act of 1894, ch. 349, 28 Stat. 509, 556. The 1894 Act was invalidated in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), but the income tax, as well as the statutory exemption for educational institutions, was reinstated in 1913, after ratification of the Sixteenth Amendment. See note 2, *supra*.

poses in § 501(c)(3) and reduces to a meaningless exercise Congress' repeated amendments of the statute to include additional exempt purposes. The fulcrum for this extravagant authority that Congress allegedly reposed in the Commissioner—the word "charitable"—simply cannot support the weight of Amicus' tortured statutory construction.[4]

The starting point of Amicus' analysis is Congress' initial enactment in 1894 of an exemption for "charitable, religious or educational purposes," which, according to Amicus (A. Br. 19), "closely tracked" Lord Macnaghten's classic enumeration of the four principal divisions of English common-law charitable trusts: "[T]rusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community * * *." *Commissioners* v. *Pemsel*, *supra*, [1891] A.C. at 583.[5] Conspicuously absent from Congress' formulation, however, is the very division on which Amicus' entire argu-

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[4] Amicus' argument that the seemingly carefully chosen words of § 501(c)(3) are tautologous must overcome not only logic, but the well-established presumption giving effect to "every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). Contrary to Amicus' claim (A. Br. 35), here the context of § 501(c)(3) also compels a disjunctive reading, as we demonstrate below.

[5] Amicus places heavy emphasis upon Lord Macnaghten's opinion in *Pemsel* (A. Br. 20-22). There, the question was whether rental income devoted to the missionary work of the Protestant Episcopal Church in "heathen nations" was exempt from taxation under a statute exempting "rents and profits of lands * * * belonging to any hospital, public school, or alms-house, or vested in trustees for charitable purposes." In determining that the term "charitable purposes" was used in its broad legal sense rather than its narrow "relief of the poor" sense, Lord Macnaghten pointed to, among other things, a sister provision of England's Income Tax Act of 1842, which required a person "acting for such school, hospital, or alms-house, or *other trust for charitable purposes*" ([1891] A.C. at 584) to prove that the exempt income was being put to charitable uses. This language satisfied Lord Macnaghten that "the Legislature considered the purposes of a public school to be charitable, and a public school to be a trust for charitable purposes, just as much

ment rests—*i.e.*, purposes beneficial to the community. Nonetheless, Amicus contends that the word "charitable" was at the time used and understood by Congress in its broad, English common-law sense,[6] rather than its narrower, traditional sense of "relief of the poor." All available evidence of legislative intent argues otherwise.

B. Had Congress intended the term "charitable" in § 501(c)(3) to be understood as applying to all organizations devoted to purposes beneficial to the community, it surely would have been consistent in its selection of language for sister Code provisions. Analysis of language elsewhere in the Code, however, fails to support Amicus' thesis, and, indeed, plainly contradicts it.

In § 501(c)(4) Congress used the phrase "operated exclusively for the promotion of social welfare" in describing the exemption available to "[c]ivic leagues or organizations not organized for profit * * *." The exemption in § 501(c)(4) for "social welfare" purposes, like the exemption for "charitable" purposes in § 501(c)(3), was initially enacted in Section II(G)(a) of the Tariff Act of 1913, ch. 16, 38 Stat. 114, 172. It was included in the 1913 Act "as a result of a belief that the provision then exempting religious, charitable or educational organizations [*i.e.*, the predecessor to § 501(c)(3)] *was not broad enough* to cover many non-profit organizations whose activities benefited the general public." *People's Educational Camp Society, Inc.* v. *Commissioner*, 331 F.2d 923, 930 (2d Cir. 1964; emphasis added); see *Tariff Schedules: Briefs and Statements on H.R. 3321 filed with the Senate Comm. on Finance*, 63d

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as an almshouse or a hospital" (*id.* at 587-588), a fact which he found sufficient "to displace the narrow view" of "charitable" taken by the lower court. *Ibid.* Here, in contrast, sister Code provisions of § 501(c)(3) (see pages 5-8), as well as all other available evidence of the meaning Congress assigned to the term "charitable," lead to the opposite conclusion.

[6] Amicus notes that the legislative history of the Tariff Act of 1894 refers frequently to the English income tax (A. Br. 20 n.16). These references, however, only discuss generally the experiences of

Cong., 1st Sess. 2001 (1913) (statement of U.S. Chamber of Commerce) (hereinafter "*1913 Briefs and Statements*").[7]

The juxtaposition in § 501 of the phrase "for the promotion of social welfare" in subsection (c)(4) and the term "charitable," which appears as but one of several enumerated exempt purposes in subsection (c)(3), manifests a clear congressional understanding of the latter term as embracing a narrower range of conduct than the former. The Commissioner so ruled in 1923[8] and the following year formally promulgated an interpretive regulation expressly providing that civic organizations "engaged in promoting the welfare of mankind, other than organizations comprehended within [§ 501(c)(3)], are included within [§ 501(c)(4)]." Treas. Reg. 65, Art. 519 (1924).

Indeed, with respect to another type of organization exempted under § 501(c)(4)—"local associations of employees, * * * the net earnings of which are devoted ex-

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England, as well as other countries, with an income tax. See H.R. Rep. No. 276, 53d Cong., 2d Sess. 5 (1894) (discussing income tax laws of England, Prussia, Austria, and Italy); 26 Cong. Rec. 584-588, 1609-1610, 1612-1614, 3781, 6612-6615 (1894). The exemption of certain organizations from England's income tax is nowhere discussed in the 1894 legislative history cited by Amicus.

[7] See *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 478 n.8 (1979).

[8] See I.T. 1800, II-2 Cum. Bull. 152 (1923) (interpreting "charitable" in its "popular and ordinary sense" as pertaining only to "relief of the poor"). The IRS continues to hold that some civic organizations devoted to the social welfare—though they would certainly qualify as common-law charities—are not "charitable" organizations qualified to receive deductions under § 170. See, *e.g.*, Rev. Rul. 70-4, 1970-1 Cum. Bull. 126; Rev. Rul. 57-297, 1957-2 Cum. Bull. 307.

Amicus (A. Br. 20, 30, 33) attaches great significance to an opinion by then Solicitor of Internal Revenue Hartson holding that the term "charitable" in the *estate tax* provisions was to be consrtued in its broad, common-law sense. Sol. Op. 159, III-1 Cum. Bull. 480 (1924). In light of Solicitor Hartson's subsequent opinion recognizing the continued validity of the Service's interpreta-

clusively to charitable, educational, or recreational purposes"—the 1924 IRS regulation defined the term "charitable" as "relief of the poor," as did the portion of the regulation pertaining specifically to § 501(c)(3) organizations. *Id.* at Arts. 517, 519; see Br. 20-22. This regulation was reissued a total of eight times before being substantially modified in 1959. See Br. 21-22.

Other related Code provisions further refute Amicus' contention that the term "charitable" in § 501(c)(3) was intended by Congress to encompass all of the other enumerated purposes. For example, § 507(g)(2) provides that the tax normally assessed on termination of a private foundation may be abated if prescribed action is taken "to insure that the assets of such private foundation are preserved for such *charitable or other purposes* specified in § 501(c)(3) * * *." Section 512(a)(3)(B)(i) excludes from the calculation of "unrelated business taxable income" all income set aside "for a purpose specified in § 170(c)(4)."[9] Identical language is also found in § 512(a)(4). Section 513(a), as discussed in our principal brief (Br. 15-16), defines "unrelated trade or business"

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tion of "charitable" in I.T. 1800 (see S.M. 2160, III-2 Cum. Bull. 151 (1924)), and in light of the Service's promulgation, in the very same year, of a *formal regulation* interpreting charitable as "relief of the poor" (Treas. Reg. 65, Art. 517 (1924)), Sol. Op. 159 lends no weight to Amicus' argument.

[9] Section 170(c)(4) permits the deduction of contributions "for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals." Amicus finds support for a broad interpretation of "charitable" in Congress' generic use of the term "charitable contribution" in § 170. The point collapses, however, in light of the numerous related Code sections that define or otherwise qualify certain statutory terms by reference to "one or more of the purposes described in § 170(c)(2)(B)." See Code sections cited in note 11, *infra*. Indeed, § 170 itself confirms Congress' intent to accord the term "charitable" a meaning separate and distinct from that of any other exempt "purpose or function" enumerated in § 501. Section 170(b)(1)(A)(iv) places percentage limitations on the allowable deduction for contributions to "an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or perform-

as any business "not substantially related * * * to the * * * performance by such organization of its *charitable, educational, or other purpose or function* constituting the basis for its exemption under § 501 (or, in the case of [certain specified organizations], to the * * * performance of *any purpose or function* described in § 501(c)(3))." Identical language appears in § 514 with respect to the definition of "debt-financed property." See *id.* at § 514(b)(1)(A)(i).[10] Finally, in the Code provisions dealing with certain taxes imposed on private foundations, the phrase "*one or more of the purposes* described in § 170(c)(2)(B)" is repeated frequently.[11]

These references to related Code provisions emphatically confirm what is plain on the face of § 501(c)(3): each term describing an exempt purpose has a separate, distinct, and finite meaning, and each of the enumerated purposes constitutes a sufficient and independent basis for exemption under § 501(a).[12]

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ance by such organization of its *charitable, educational, or other purpose or function* constituting the basis for its exemption under § 501(a)) from the United States * * *." Identical language is found in § 170(b)(1)(A)(vi). See also § 170(e)(1)(B)(i).

[10] In the Code provisions relating to employment taxes, Congress defined "employment" to exclude "service performed in the employ of a *religious, charitable, educational, or other organization* described in § 501(c)(3)." 26 U.S.C. 3121(b)(8)(B) and 3306(c)(8). Section 4911(e)(1)(A), which imposes a tax on excess lobbying expenditures by certain exempt organizations, defines "exempt purpose expenditures" to mean the "amounts paid * * * to accomplish *purposes described in § 170(c)(2)(B) (relating to religious, charitable, educational, etc., purposes).*"

[11] See 26 U.S.C. 4942(g)(1), 4944(c), 4945(d)(5), 4947(a)(1), 4947(a)(2) and 4947(b)(3)(A).

[12] Amicus invokes (A. Br. 37) the doctrine of *noscitur a sociis*, as enunciated in *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303 (1961). *Jarecki*, however, compels a disjunctive reading of the purposes listed in § 501(c)(3). As in *Jarecki*, the words of the provision "strongly suggest that a precise and narrow application was intended * * *" and to hold otherwise would be to "adopt a strained reading which renders one part a mere redundancy." *Id.* at 307. Indeed, Amicus' reading is particularly strained since Congress has

C. Amicus' contention that Congress used the term "charitable" in its sweeping common-law sense is further contradicted by the statute's legislative history. Amicus attaches great significance to a few errant remarks by some individual legislators concerning "charitable organizations" or "charitable purposes" generally (A. Br. 24-28). While casual review of the context of the cited remarks robs them of their proffered significance,[18] our response does not depend on a parsing of these passages.

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amended the sentence several times, adding one "redundancy" after another. Further, the common-law meaning of "charitable" is so broad and elastic as to have no precise boundaries, the classic circumstance for invoking the narrowing doctrine of *noscitur a sociis*. *Ibid.*; see *National Muffler Dealers Ass'n* v. *United States*, *supra*. Nor can support for Amicus' construction of § 501(c)(3) be found in decisions (A. Br. 36) in which this Court has "look[ed] beyond the mere words to the *obvious intent* [and] cannot help seeing that the word 'or' must be taken conjunctively." *Union Insurance Co.* v. *United States*, 73 U.S. (6 Wall.) 759, 764 (1867); see *De Sylva* v. *Ballentine*, 351 U.S. 570, 573-576 (1956); *United States* v. *Fisk*, 70 U.S. (3 Wall.) 445, 447 (1865). Unlike the cited cases, reading the word "and" into § 501(c)(3) in place of "or" would not remove an absurdity, but rather would create one—we doubt that any organization in the country is devoted to *all* of the enumerated purposes. See note 4, *supra*.

[18] Amicus relies (A. Br. 25-26) largely on a single reference from the 1902 House Ways and Means Committee report that mentions "the whole domain" of charities; in context, that phrase refers to a specific listing of "charitable" organizations, all of which comfortably fit the narrow "relief of the poor" concept. H.R. Rep. No. 1702, 57th Cong., 1st Sess. 3 (1902). Representative McCall's remarks in 1902 similarly were made in the narrow context of a like listing of charities he referenced. 35 Cong. Rec. 5564-5565 (1902). Senator Bacon's statement in 1909 referred not to § 501(c)(3), but to a separate amendment exempting a broader class of religious, educational, charitable and "benevolent" institutions from a tax on corporate income. 44 Cong. Rec. 4149-4150 (1909). Senator Hollis' statement in 1917 is misquoted; he actually explained his amendment as concerning "donations to charity." 55 Cong. Rec. 6728 (1917). Moreover, shortly thereafter Senator Robbins argued forcefully that a tax deduction for contributions to "charitable organizations" should be enacted "in the interest of the poor people." 56 Cong. Rec. 10426 (1918). Indeed, "relief to the poor" was a concept

Our point is simply this: After investigating § 501(c)(3)'s legislative history, which spans over 80 years and includes nine additions to its language, Amicus has not cited, and we have not found, a single passage stating or implying that Congress intended to exempt all organizations devoted to any purpose "beneficial to the community," that it intended the Commissioner to regulate eligibility for § 501(c)(3) exemptions in accordance with his perceptions of "public policy," that it intended *bona fide* "educational" or "religious" organizations to qualify also as common-law charities, or that it used the term "charitable" in its common-law sense rather than its commonly understood "relief of poverty" sense. Had Congress intended so unusual and sweeping a construction of the seemingly simple, straightforward language of § 501(c)(3), the statute's legislative history would surely contain clear evidence to that effect. The legislative history, however, is rich with evidence precisely to the contrary.

Section 501(c)(3) can be traced back to § II(G)(a) of the 1913 Tariff Act, which was enacted on the heels of ratification of the Sixteenth Amendment. The bill initially introduced in the House exempted only religious, charitable, and educational organizations, as had the Tariff Act of 1894. 50 Cong. Rec. 1306 (1913). On the House floor, Representative Rogers offered an amendment adding "benevolent" and "scientific" to the list of exempt purposes. Citing a Massachusetts state court decision,[14] Rogers counseled that the terms "charitable" and

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equated with the term "charitable" throughout the debates in 1917. See *id.* at 10418-10428. And in 1935 Representative McCormack (79 Cong. Rec. 12423) and the House minority report (H.R. Rep. No. 1681, 74th Cong., 1st Sess. 20), both referred to by Amicus, explained that charitable deductions are for the benefit of corporations contributing to "community chests and other charities" that help assume "the burden of caring for unemployables." See also remarks of Rep. Kramer, 79 Cong. Rec. 12423 (1935).

[14] Representative Rogers was apparently referring to *New England Theosophical Corp.* v. *Boston*, 172 Mass. 60, 63 (1898), which held that "[t]he word 'charitable' refers to hospitals and other

"benevolent" are not synonymous and that benevolent organizations are equally deserving of exemption. *Ibid.*

Rogers' Amendment was defeated (*ibid.*),[15] but in the Senate the bill was amended to accord tax-exempt status to "scientific" organizations. Moreover, the same Senate amendment added § 501(c)(4)'s predecessor, exempting "any civic league or organization * * * operated exclusively for the promotion of social welfare" (50 Cong. Rec. 3856 (1913)), based specifically on the view that such "civic * * * organizations could not be held to be 'organized and operated exclusively for religious, charitable, or educational purposes.'" *1913 Briefs and Statements, supra*, at 2002. Thus, Congress refused to include a sweeping term ("benevolent") designed to exempt any philanthropic purpose, yet at the same time enlarged the scope of § 501(c)(3) by adding another specific, limited purpose ("scientific") to the list—a purpose that clearly would have been embraced within the exemption for "charitable" purposes had Congress intended that term to be construed in its common-law sense. And, with the same stroke of the pen, Congress elsewhere exempted, in plain and straightforward language, all civic organizations devoted to promoting the general welfare. See text, *supra*, at 5-6. In light of this legislative history, Amicus' proffered interpretation of § 501(c)(3) is untenable.

Organizations devoted to "prevention of cruelty to children or animals" and "literary" purposes were ex-

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charitable institutions for the relief of the poor or the sick." The Massachusetts court interpreted "benevolent" more broadly, to include "charitable" purposes as well as activities inspired by "kindness, good will, or a disposition to do good * * *." *Id.* at 62.

[15] Representative Hull opposed the amendment, arguing that all nonprofit corporations were exempt, and that accordingly, there was "no occasion whatever for undertaking to particularize." 50 Cong. Rec. 1306 (1913). Congress as a whole, however, did find a need to particularize, adding only "scientific" to the list of exempt purposes.

empted in 1918 and 1921, respectively.[16] The Revenue Act of 1924, ch. 234, Section 231(6), 43 Stat. 282, reenacted the provisions of § 501(c)(3) without change, notwithstanding an enthusiastic effort on the Senate floor to reverse the Commissioner's 1923 interpretation of "charitable" as "relief of poverty." Senator Willis, explaining that the "Commissioner * * * has decided that under the existing law an allowance can not be made for gifts to a community chest unless those gifts shall be for the relief of the poor" (65 Cong. Rec. 8171 (1924)), sought to amend the section by adding the following parenthetical after the word "charitable": "(including preventive and constructive service for relief, rehabilitation, health, character building, and citizenship)" (*ibid.*). While acknowledging that this amendment had been criticized "in private conversation because it is thought that language is too broad," Senator Willis nonetheless stated (*ibid.*) that his purpose was to bring "general welfare work" within the meaning of "charitable." Senators Smoot and Walsh responded that the terms of the amendment were too sweeping and indefinite. See *id.* at 8172. Arguing that the statute as written goes "just as far

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[16] Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1076; Revenue Act of 1921, ch. 136, § 231(6), 42 Stat. 253. Neither amendment sparked lengthy discussion. During the Senate hearings concerning a series of amendments to § 501's predecessor, the Treasury Department's Tax Adviser testified that bona fide nonprofit Masonic, Odd Fellows, and similar organizations had been exempted by the IRS, but that the IRS "had the hardest kind of task to prove that they were educational institutions." *Internal Revenue: Hearings on H.R. 8245 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 76 (1921) (*"1921 Hearings"*). Proving that these oragnizations qualified under Amicus' construction of "charitable" would have been no task at all.

Quoting a remark made by Senator Smoot during the 1921 hearings, Amicus states (A. Br. 40 n.38): "Congress noted that the law [regarding the "charitable" nature of gifts for governmental purposes] had 'always been construed that way anyhow.'" Senator Smoot's remark, however, had nothing to do with gifts for governmental purposes, but rather concerned the IRS' practices with respect to calculating the maximum allowable deduction under § 170's

as it is safe to go," Senator Smoot stated (*ibid.*): "It seems to me * * * that we have properly limited the exemptions that ought to be allowed to gifts for religious, charitable, scientific, literary, or educational purposes. Now, if we are going virtually to use the word 'welfare' —and that is what the Senator says his amendment means—* * * no human being can tell where it is going to end." [17] The amendment was rejected.

As noted in our principal brief (Br. 20-22), over the next three decades Congress repeatedly *reenacted* § 501(c)(3), amending its language on three occasions to include provisions wholly redundant under Amicus' interpretation.[18] Similarly, the IRS regularly reissued its regulations interpreting "charitable" as relief of poverty. See Br. 21-22. Thus, contrary to Amicus' contention (A. Br. 33-34), when Congress reenacted the Code in 1954, the formal administrative interpretation of § 501(c)(3) had for 30 years been uniformly and directly contrary to Amicus' proffered construction.[19] Moreover, had Con-

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predecessor. See *1921 Hearings*, *supra*, at 54 (remarks of Sen. Smoot and Dr. Adams).

[17] Senator Walsh expressed a similar concern. 65 Cong. Rec. 8172 (1924).

[18] Amicus also relies (A. Br. 26) on a 1938 House Ways and Means Committee Report, H.R. Rep. No. 1860, 75th Cong., 3d Sess. (1938), for his argument (Br. 26-28) that Congress must have intended to require all § 501(c)(3) organizations to qualify as common-law charities. We deal with this point in our principal brief (Br. 22 n.19) and add only that the very House Report on which Amicus relies refutes his construction of "charitable." In no less than four places, the Report discusses deductions and exemptions for "*charitable and other purposes*" and in one telling passage acknowledges the deductibility of funds "used * * * for charitable and *other purposes* (*such as missionary and educational purposes*)." H.R. Rep. No. 1860, *supra*, at 19-20.

[19] Amicus' contention (Br. 23-33) that the IRS and the lower federal courts have consistently applied common-law standards under § 501(c)(3) is not well-taken. His reliance on Sol. Op. 159 is discussed at note 8, *supra*. A number of IRS rulings before and after 1959 have shown clearly that providing relief for the poor is a cen-

gress "incorporated" the common-law concept of charity into § 501(c)(3) in 1954, as Amicus maintains (A. Br. 33-34), certainly some hint of its intention would be reflected in the record of legislative deliberations accompanying passage of the Act. Instead, the record reflects only that Congress *amended* § 501(c)(3) to "incorporate" another specific and limited exempt purpose [20]—a purpose ("testing for public safety") clearly within the existing exemption for "charitable" purposes under Amicus' interpretation.

This extended record of legislative activities and regulatory interpretations overwhelmingly refutes Amicus' claim that Congress at all times between 1894 and 1954 used the term "charitable" in § 501(c)(3) and its prede-

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tral element of "charitability" under § 501(c)(3). See, e.g., Rev. Rul. 64-231, 1964-2 Cum. Bull. 139; Rev. Rul. 61-72, 1961-1 Cum. Bull. 188; Rev. Rul. 57-467, 1957-2 Cum. Bull. 313; Rev. Rul. 56-185, 1956-1 Cum. Bull. 202 (hospital and other organizations exempt only if indigents receive free or reduced-cost care).

Amicus' citation of judicial authority is also unpersuasive. In *Slee* v. *Commissioner*, 15 B.T.A. 710, 715 (1929), aff'd, 42 F.2d 184 (2d Cir. 1930), the Board of Tax Appeals specifically rejected a broad definition of the purposes qualifying for deduction. Judge Learned Hand affirmed, noting that, while a clinic providing free health care to those who cannot afford to pay is a charitable venture, the organization's lobbying activities in that case kept it from being *exclusively charitable*. 42 F.2d at 185-186. Although several courts have discussed common-law as well as statutory standards in cases dealing with §§ 501(c)(3) and 170, and related provisions, their holdings generally have been on narrow statutory grounds. See, *e.g.*, *Underwriters' Laboratories, Inc.* v. *Commissioner*, 135 F.2d 371, 373 (7th Cir. 1943) (denying exemption due to private inurement); *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108, 110-111 (3d Cir. 1941) (granting exemption to "religious" organization despite its attempts to influence legislation in the absence of a statute barring such activity); *Hazen* v. *National Rifle Association*, 101 F.2d 432, 436 (D.C. Cir. 1938) (denying exemption because educational activities were "incidental and collateral"); *St. Louis Union Trust Co.* v. *Burnet*, 59 F.2d 922, 928 (8th Cir. 1932) (granting charitable deduction where testator "intended to provide for relief of the poor" but used the broader term "benevolent").

[20] Internal Revenue Code of 1954, ch. 736, 68A Stat. 163.

cessor provisions in the broad common-law sense. Nonetheless, in 1959 the IRS issued regulations under § 501 (c) (3) assigning to the term "charitable" its expansive common-law meaning. See 26 C.F.R. 1.501(c) (3)-1(d) (2). As noted in our main brief (Br. 23 n.21), a regulation so "out of harmony with the statute, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936); *Iselin* v. *United States*, 270 U.S. 245, 250-251 (1926); *Morrill* v. *Jones*, 106 U.S. 466, 467 (1882).

D. Amicus contends (A. Br. 33-34, 48-56) that Congress has since 1959 "ratified and approved the construction placed on § 501(c) (3)" by the IRS in its 1959 regulations and Rev. Rul. 71-447—and by the district court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971). We have dealt with this contention in our principal brief (Br. 26-38), but a further comment is needed.

The statutory construction purportedly accepted and ratified by Congress assigns to the term "charitable" its all-encompassing common-law meaning. Thus, neither the IRS regulations, the *Green* court, nor Amicus suggests that Congress had a specific intent to deny exempt status to racially discriminatory schools. As previously noted (note 2, *supra*), such an interpretation is foreclosed by the history of racial segregation surrounding the statute's enactment in 1913.

The inquiry into congressional ratification here is thus not governed by the narrow question whether Congress approves or disapproves of the result yielded by the questioned regulations, the *Green* decision and Amicus' similar analysis (*i.e.*, that racially discriminatory educational institutions are denied tax benefits). It is, instead, concerned solely with the separate question whether the statutory interpretation relied upon to reach that result (*i.e.*, use of the expansive common-law meaning of "charitable" to define the contours of § 501(c) (3)) has been approved by subsequent Congresses as reflective of the original legislative intent. In short, as in all cases of statutory construction, the issue is not whether a *result* yielded by

an administrative interpretation appears to be consistent with a subsequent analogous enactment, but rather whether "that *interpretation* is the one intended by Congress." *CBS, Inc.* v. *FCC*, 453 U.S. 367, 385 (1981), quoting *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran, Inc.*, No. 80-203 (May 3, 1982), slip op. 23; *Haig* v. *Agee*, 453 U.S. 280, 301 (1981); *United States* v. *Rutherford*, 442 U.S. 544 (1979).[21]

Amicus argues (A. Br. 51) that by enacting § 501(i) in 1976, Congress "approved the IRS interpretation of § 501(c)(3) with positive legislation."[22] But passage of

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[21] Each of the cases relied upon by Amicus—*CBS*, *Haig*, and *Rutherford*, *supra*,—involved an administrative statutory construction that was (1) longstanding and consistent, (2) supported by or consistent with the statute's plain language, (3) supported by persuasive legislative history, and (4) not overturned by Congress. Here, the IRS' regulatory construction of the term "charitable" was "substantially contemporaneous" (see, *e.g.*, *National Muffler Dealers Ass'n* v. *United States*, *supra*), longstanding and consistent until 1959, when the regulatory construction was broadened to incorporate common-law concepts. As the Court noted in *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 9-10 n.12, a change in an administrative construction "undercut[s] the argument that the regulations are entitled to deference * * *." See, *e.g.*, *Haig* v. *Agee*, *supra*, 453 U.S. at 303. Moreover, Amicus' interpretation of the statute requires a contortion of its language. See, *e.g.*, *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978). Finally, Amicus' interpretation of "charitable" is contradicted by the statute's legislative history and is inconsistent with every pertinent congressional action taken since 1913. That Congress has not taken formal action to overturn the IRS' 1959 regulation cannot, under these circumstances, be accorded weight. Indeed, we point out that a failure by Congress formally to overturn an agency's statutory construction will be a feature of *every* case in which the administrative construction is contested—else there would be no case.

[22] Amicus also contends that Congress "acquiesced" in the agency's 1959 intepretation of "charitable" when it passed the Tax Reform Act of 1969. In reality, however, Congress in 1969 added to the Code no less than eight separate provisions containing language wholly at odds with Amicus' all-encompassing construction of the term

that provision cannot be considered legislative approval of a reading of § 501(c)(3) that would lodge with the Commissioner "unfettered power" to grant or deny exempt status on the basis of "the particular brand of social policy [he] happens to be advocating at the time." *Commissioner* v. *"Americans United," Inc., supra*, 416 U.S. at 774-775 (Blackmun, J., dissenting).[23] To the contrary, Congress framed § 501(i) in precise terms, directing the IRS to deny tax-exempt status only to § 501(c)(7) social clubs that have a written policy of racial discrimination.

As Amicus points out (A. Br. 51), in light of *Green* Congress had no occasion in 1976 to consider the question of exemptions to racially discriminatory schools. If it had—for example, if *Green* had recently been decided the other way—passage of § 501(i) strongly suggests that Congress would likely have sought to achieve the same *result* with respect to exempt educational organizations. By no means, however, does enactment of § 501(i) sug-

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"charitable." See 26 U.S.C. 170(e)(1)(B)(i); 507(g)(2); 4942(g)(1); 4944(c); 4947(a)(1); 4947(a)(2); 4947(b)(3)(A); 4945(d)(5). Moreover, while the House Report cited by Amicus (A. Br. 34) does indeed recognize that the term "charitable" had been "used in the law of trusts for hundreds of years," it also recognizes that "internal revenue agents" determined the existence of a "charitable" purpose under "a concept of service to the poor and not merely useful nonprofit service to those who can afford it." H.R. Rep. No. 91-413 (Pt. I), 91st Cong., 1st Sess. 35, 43 (1969).

[23] Notwithstanding Amicus' effort to gainsay the importance of the public policy against sex discrimination (A. Br. 47 n.48), the theory relied upon by Amicus simply cannot be confined to racial discrimination. See note 25, *infra*. Indeed, the "public policy" determinations made by the Commissioner since 1970 demonstrate the difficulties inherent in the exercise of such broad discretion. See Rev. Rul. 77-272, 1977-2 Cum. Bull. 191 (exempting program discriminating against non-Indians); Rev. Rul. 75-384, 1975-2 Cum. Bull. 204 (denying exemption to "disrup[tive]" antiwar protest group); Rev. Rul. 78-305, 1978-2 Cum. Bull. 172 (exempting group fostering tolerance of homosexuality). See also *McCoy* v. *Schultz*, 1973-1 U.S.T.C. ¶ 9233 (1973) (exempting sexually discriminatory group).

gest congressional approval, much less ratification, of the contrived statutory *interpretation* yielding the result in *Green*. The term "charitable" was in no way involved in the amendment, and nothing in the legislative history of § 501(i) suggests an intent to give an expansive reading to that term in § 501(c)(3).

Indeed, it clearly appears that the 1976 Congress had precisely the contrary understanding of § 501(c)(3). For, in the same year that it added § 501(i), Congress also amended the language of § 501(c)(3), adding to the list of exempt organizations, those institutions "foster[ing] national or international amateur sports competition." Pub. L. No. 94-455, § 1313(a), 90 Stat. 1730. Such organizations, while clearly "charitable" in the common-law sense (see 122 Cong. Rec. 25960 (1976)), were expressly exempted because of congressional uncertainty as to whether they qualified as *educational* organizations. See 122 Cong. Rec. 25961 (1976) (remarks of Sens. Long and Culver). No one suggested that amateur sports organizations would qualify as "charitable."

Nor do the 1978 congressional debates concerning the Ashbrook and Dornan Amendments support the expansive interpretation of § 501(c)(3) urged by Amicus. As recounted in detail in our main brief (Br. 26-31, 33), Congress' reaction to the Kurtz regulations leaves no room to argue that the common-law definition of "charitable" received legislative ratification.[24]

E. It is thus clear that Congress did not authorize the IRS in § 501(c)(3) to deny tax-exempt status to *bona fide* educational institutions on the ground that they are

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[24] Amicus' sweeping assertion (A. Br. 54) to the contrary is erroneous. While numerous legislators expressed agreement with the result of denying tax-exempt status for racially discriminatory schools, many also indicated their belief that the IRS had acted without authority in 1970. *See Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 586-587 (1979) (remarks of Sen. Thurmond); 125 Cong. Rec. H5884 (daily ed., July 13, 1979) (Rep. Grassley).

not also "charitable" in the common-law sense.[25] For all of the reasons stated here and in our principal brief,[26] the judgments of the courts of appeals should be reversed.

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[25] Amicus' separate reliance on *Tank Truck Rentals, Inc.* v. *Commissioner*, 356 U.S. 30 (1958), is equally misplaced. To our previous discussion of that argument (Br. 24-26), we add only that the extension of *Tank Truck* beyond deductions under § 162(a) of the Code contradicts language in Justice Clark's opinion in that case (356 U.S. at 33) and other decisions of this Court. See *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941); *Lilly* v. *Commissioner*, 343 U.S. 90, 94-95 (1951); *Speiser* v. *Randall*, 357 U.S. 513, 543 (1957) (Clark, J., dissenting on other grounds). See also *Commissioner* v. *Sullivan*, 356 U.S. 27, 29 (1958); *Commissioner* v. *Heininger*, 320 U.S. 467, 473-74 (1943). Moreover, that the breadth of Amicus' proffered interpretation of *Tank Truck* is without discernible limits is amply illustrated by Amicus' effort to show (A. Br. 47 n.48) that gender-based discrimination is insufficient to warrant denial of tax-exempt status. Surely the national policy against sex discrimination is no less clear and compelling than the policy underlying the vehicle weight statutes in *Tank Truck*. 356 U.S. at 34. If, as Amicus claims, the aim is to make exception only in cases involving policies that "occupy a unique place" (A. Br. 47), it is best accomplished through specific legislation, as in the past, rather than requiring Congress to "correct any perceived errors" in the wide-ranging "public policy" determinations that the IRS would be called upon to make under Amicus' theory.

[26] Amicus' Fifth Amendment argument, based largely on *Norwood* v. *Harrison*, 413 U.S. 455 (1973), is without merit (A. Br. 57-62). In *Norwood*, the State of Mississippi, by virtue of judicial findings of *de jure* segregation in its public schools, was under an affirmative duty "not to take any action that would impede the process of disestablishing the dual system and its effects." *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 538 (1979); see *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 488 (1972). The State's purpose in violating that duty by providing textbooks to students attending racially discriminatory private schools was irrelevant. *Dayton Bd. of Educ.* v. *Brinkman, supra*, 443 U.S. at 538. Here, the United States is not subject to any similar judicial determination and is thus under no such affirmative duty. Accordingly, the Fifth Amendment imposes no bar to the granting of tax exemptions to petitioners absent proof that the United States acted with a racially discriminatory purpose. See our main brief at 38-39.

Respectfully submitted.

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OCTOBER 1982

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* The Solicitor General is disqualified in these cases. See also note *, page (I) of our principal brief.

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BOB JONES UNIVERSITY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH COMMITTEE, *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a 250,000-member national organization dedicated to protecting the fundamental rights of the people of the United States, including two rights which would be abridged if the petitioners' arguments prevailed: the right to be free from government-supported racial discrimination, and the right to be free from governmental establishment of religion.

While recognizing the right to belong to and participate in private organizations, ACLU policy -- grounded in the Constitution's equal protection guarantee -- opposes the

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* The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court.

grant to any racially discriminatory organization of. . .

> ". . . public funds, tax exemption of income (investment or otherwise) or property, deduction of contributions, or any other governmental assistance, financial or otherwise (except for essential services available equally to all members of the community, such as police and fire protection and grants of corporate charters)."

As a champion of the rights protected by the First Amendment's religion clauses, ACLU maintains that the Free Exercise Clause does not require any exception from the foregoing policy for organizations whose racial discrimination is based upon sincere religious beliefs, and moreover that any such exception would violate the Establishment Clause.

The American Jewish Committee ("AJC") is a 50,000-member national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been AJC's conviction that the security and constitutional rights of American Jews can best be protected by helping to preserve the security and constitutional rights -- including specifically the right to equal educational opportunities -- of all Americans, irrespective of race, creed, or national origin. Therefore, AJC has participated in numerous cases before this Court involving racial discrimination by educational institutions. It is AJC's position that the denial of tax-exempt status to educational

institutions which are racially discriminatory as a matter of religious conviction does not violate the First Amendment's Free Exercise Clause.

Consistent with their policies, ACLU and AJC, amici curiae, urge this Court to affirm the decisions of the United States Court of Appeals for the Fourth Circuit in these now-consolidated cases.

SUMMARY OF ARGUMENT

The I.R.S. rule at issue here -- which denies tax-exempt status to all racially discriminatory schools -- is constitutionally mandated. The Fifth Amendment's equal protection guarantee prohibits the federal government from providing any tan-

gible assistance, including tax-exempt status, to any private schools that discriminate on the basis of race. Nor does the Constitution permit an exception to this absolute prohibition for sectarian schools whose racial discrimination derives from religious beliefs.

Even assuming arguendo that the I.R.S. rule imposed any burden on petitioners' religious practices, any such burden would be heavily outweighed, in the balancing analysis applicable to petitioners' free exercise claims, by the compelling, constitutionally mandated national interest in eliminating government-supported race discrimination in education.

In any event, the denial of government tax benefits does not

impose even an indirect burden upon any religious belief or practice asserted by petitioners; they remain completely free to inculcate whatever values they choose, including racial segregation, and their tax-exempt status is not conditioned on the violation of any practices dictated by the asserted religious beliefs. Bob Jones University's tax-exempt status is not conditioned upon any violation of the only religious duty it asserts -- namely, to eschew interracial marriage and dating relationships; Bob Jones does not assert any religious duty to shun racially integrated schools. Likewise, Goldsboro's tax-exempt status is not conditioned on abandonment of

the practice dictated by the religious belief which it asserts -- namely, complete separation of the races; even apart from the I.R.S. rule, the realities of twentieth-century American life and our national commitment to integration make it impossible for Goldsboro's students or their parents to realize wholesale separation from individuals of other races.

Far from violating the Establishment Clause, as petitioners contend, the uniform application of the I.R.S. rule to all racially discriminatory schools -- including sectarian schools whose discrimination is based on religious beliefs -- is the only policy consistent with the Establishment Clause. No Establish-

ment Clause problems arise merely because a government rule -- which, like the instant one, is neutral on its face and adopted for legitimate secular purposes -- coincides with the tenets of some religions but not others. The I.R.S. rule does not entail any excessively entangling governmental inquiries into sectarian schools' policies. On the contrary, such inquiries would be required by an exception for schools such as petitioners; such exception would force the government to ascertain the sincerity of the asserted religious beliefs and the tightness of the fit between such beliefs and the racially discriminatory policies allegedly compelled thereby. Furthermore, a

special exception for religiously-based discrimination would amount to special government financial assistance to religious institutions, a classic violation of the Establishment Clause.

Finally, because the Equal Protection guarantee permits even less government aid to any racially discriminatory school than the Establishment Clause permits to sectarian schools, and because excepting sectarian schools from the general denial of tax benefits to racially discriminatory schools would constitute impermissible aid for Establishment Clause purposes, a fortiori, such an exception would constitute impermissible aid for Equal Protection purposes.

ARGUMENT

I. THERE IS A COMPELLING, CONSTITUTIONALLY MANDATED NATIONAL INTEREST IN ELIMINATING ALL GOVERNMENT SUPPORT FOR RACE DISCRIMINATION IN ALL SCHOOLS.

Because "education is perhaps the most important function of state and local governments," and because the segregation of school children "may affect their hearts and minds in a way unlikely ever to be undone,"* any government support of race discrimination in the schools is diametrically opposed to "the compelling governmental interest in moving nearer [the] noble goal" of fulfilling "[t]he constitutional imperative to

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* Brown v. Board of Education, 347 U.S. 483, 493-94 (1954).

eliminate the badges of slavery...."* As this Court enjoined in Cooper v. Aaron, 358 U.S. 1, 19 (1958):

> "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the [Fifth Amendment's] concept of due process of law. Bolling v. Sharpe, 347 U.S. 497."

The Court more recently reaffirmed this fundamental principle in Norwood v. Harrison, 413 U.S. 455

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* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).

(1973), which repeatedly stressed that the government may not give a racially discriminatory school any "tangible" aid, id. at 458, 464, 466:

> "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."

Id. at 497.*

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* Accord, Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part):

> "Something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination.

(Footnote continued)

The elimination of government support for race discrimination in all schools, public and private, promotes the compelling national policy of eradicating race discrimination throughout our society in two specific ways. First, it discourages race discrimination in the private sector. Numerous judicial decisions

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(Footnote continued)

> Accordingly ... this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken .... These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination." [Citations omitted].

and legislative enactments manifest the growing national commitment to ending private race discrimination, a commitment which is especially strong in the sphere of education. For example, in Runyon v. McCrary, 427 U.S. 160 (1976), this Court held that § 1 of the 1866 Civil Rights Act, 42 U.S.C. § 1981, prohibits private, commercially operated, nonsectarian schools from denying admission on the basis of race.

Eliminating government support for race discrimination in education will also foster the all-important but elusive goal of achieving a racially integrated public school system by reducing the well-documented "white flight" phenomenon

-- i.e., the massive withdrawal of white children from the public schools and the concomitant establishment of segregated private schools in the wake of desegregation efforts. See, e.g., Norwood, supra, 413 U.S. at 457 (between 1964 and 1970, the number of private non-Catholic schools in Mississippi had increased from 17, with a total enrollment of 2,362, to 155, with a virtually all-white enrollment of approximately 42,000). The United States Commission on Civil Rights estimates that, as of 1979, 3,500 private schools had been created or substantially expanded concurrently

with public school desegregation.* "White flight" seriously hinders the integration of public school systems both by creating mostly- or all-black public schools, and by undermining financial support for public schools. Note, 1977 Duke L.J. 1219, 1252-53 & nn. 131-32 (1977); see Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833, 856-57 (E.D. La. 1967), aff'd, 389 U.S. 571 (1968):

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* See Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 479 (1979) (Statement of E. Richard Larson, on behalf of the American Civil Liberties Union).

> "Unless this system [of private segregated schools] is destroyed, it will shatter to bits the public school system of Louisiana and kill the hope that now exists for equal educational opportunities for all our citizens, white and black."

II. THE GRANT OF TAX-EXEMPT STATUS CONSTITUTES CONSTITUTIONALLY PROHIBITED GOVERNMENT AID TO RACIALLY DISCRIMINATORY SCHOOLS.

The grant of tax-exempt status to racially discriminatory schools is constitutionally prohibited because it constitutes "tangible" government support for private racial discrimination. Norwood v. Harrison, supra, 413 U.S. at 458, 464, 466, 467.*

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* The degree of government support necessary for a conclusion that the Constitution prohibits such support

(Footnote continued)

In light of the compelling national policy and constitutional dictate to eliminate all government support for racially discriminatory schools, courts have appropriately been particularly ready to find that

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(Footnote continued)

is lower than the degree of government support necessary for a conclusion that the Constitution prohibits the underlying private discrimination. Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182, 1189 (D. Conn. 1974). Nevertheless, courts have indicated that the grant of tax-exempt status may constitute such significant government support for private racial discrimination that even the private discrimination itself is thereby rendered impermissible. See, e.g., Jackson v. Statler Foundation, 496 F.2d 623, 628-30 (2d Cir. 1973), cert. denied, 420 U.S. 927 (1975); Falkenstein v. Dep't of Revenue, 350 F. Supp. 887, 888-89 (D. Or. 1972), appeal dismissed, 409 U.S. 1099 (1973).

any form or degree of government support to such schools -- including specifically the grant of tax-exempt status -- is impermissible. For example, in Pitts v. Department of Revenue, 333 F. Supp. 662, 668 (E.D. Wis. 1971), which held a state to be constitutionally barred from granting tax-exempt status to racially discriminatory educational and religious organizations, the court stressed:

> "[W]hatever its nature in other contexts, a tax exemption constitutes affirmative, significant state action in an equal protection context where racial discrimination fostered by the State is claimed."

Other federal courts have also "struck down tax exemptions for

institutions practicing the crudest form of racial discrimination -- the exclusion of blacks from attendance in schools or membership in clubs of a public nature." Jackson v. Statler Foundation, supra, 496 F.2d 623, 637 (2d Cir. 1973) (Friendly, J., dissenting from denial of reconsideration en banc), cert. denied, 420 U.S. 927 (1975) (emphasis supplied). See, e.g., Falkenstein v. Department of Revenue, 350 F. Supp. 887, 889 (D. Or. 1972), appeal dismissed, 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); cf. Green v. Connally, 330 F. Supp. 1150, 1169, 1171 (D.D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404

U.S. 997 (1971) (dicta).*

This Court has specifically held that a degree of government support which may be permissible in the context of other constitutional guarantees -- including, for example, the right to be protected from any governmental establishment of religion -- is impermissible in the context of

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* Compare Marker v. Shultz, 485 F.2d 1003, 1006-07 (D.C. Cir. 1973) (rejecting claim that grant of tax-exempt status to labor unions constitutes impermissible government support for union activities, and distinguishing Green and McGlotten, supra, because they involved "constitutional rights rooted in the Civil War and the Amendments passed in the wake of the Civil War, which operate to eradicate any government involvement whatever, however 'minimal and remote,' that might in any way foster racial discrimination in the schools.")

the constitutional guarantee of equal protection of the laws, at least when race discrimination is involved.*

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* See Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1135-36 (C.D. Cal. 1976), vacated on other grounds, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824, (1980):

> "A growing number of circuits openly express the view that the degree of involvement required for a showing of significant state involvement is less when racial discrimination is involved." [Citations omitted].

Thus, the Writers Guild opinion aptly dispels a shibboleth raised by petitioners when they argue that the denial of tax-exempt status to racially discriminatory private schools would require the denial of tax-exempt status to all other private organizations with practices contrary to public policy.

> "In short, it is one thing for a state to offer support to institutions which prac-

(Footnote continued)

In Norwood v. Harrison, supra, 413 U.S. at 470, the Court stated:

> "However narrow may be the channel of permissible state aid to sectarian schools... [the Establishment Clause] permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices...."

Accordingly, in Norwood the Court held that a state program of loaning

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(Footnote continued)

> tice racial discrimination or sex discrimination and quite another for the state to offer aid to hospitals which happen to have decided not to perform abortions, to schools whose disciplinary procedures would not meet constitutional requirements if practiced by government institutions, or to other institutions whose personnel procedures do not measure up to those required of government." 423 F. Supp at 1136.

school books to children in public and private (including sectarian) schools violated the Equal Protection Clause insofar as books were loaned to children attending racially discriminatory private schools, although the Court had previously upheld a virtually identical state program as against an Establishment Clause challenge in Board of Education v. Allen, 392 U.S. 236 (1968).

For this reason, the Court's holding that churches may be granted tax-exempt status consistent with the Establishment Clause, in Walz v. Tax Commission, 397 U.S. 664 (1970), is wholly inapposite to the separate question -- to be determined according to far stricter standards --

whether such tax-exempt status may be granted to racially discriminatory schools consistent with the Equal Protection Clause. A tax exemption which may survive the standard of "benevolent neutrality" applicable to government action for Establishment Clause purposes* may well be struck down under the standard of strict neutrality imposed upon government conduct for equal protection purposes.**

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* See Walz, supra, 397 U.S. at 669: "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

** See, e.g., Reitman v. Mulkey, 387 U.S. 369, 375-76 (1967).

The grant of tax-exempt status to racially discriminatory schools constitutes "tangible" -- and hence unconstitutional -- government support for two major reasons: first, because it is economically equivalent to a direct government subsidy; and second, because it confers an imprimatur of government approval.

This Court has recognized that "in practical terms" there is "little difference" between a state's giving to parents of private school students, on the one hand, a tax deduction for tuition and, on the other hand, a direct tuition grant:

> "The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools.

> The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sums he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'" Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 790-91 (1973).*

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* Similarly, the various separate opinions filed in Walz, supra, achieved unanimity on the point that the grant of tax-exempt status constitutes an economic benefit provided by the government: 397 U.S. at 674 (majority); at 690, n.9 (Brennan, J., concurring); at 699 (Harlan, J., concurring) (exemptions are "economically indistinguishable" from direct subsidies); at 701, 709 (Douglas, J., dissenting).

Because Nyquist struck down tax benefits to sectarian schools under the Establishment Clause, and because Norwood held that the Establishment Clause permits more government aid to private sectarian schools than the Equal Protection Clause permits to private racially discriminatory schools (413 U.S. at 470), it follows, a fortiori, that this Court must strike down any tax benefits to racially discriminatory private schools. E.g., Griffin v. County School Board, 377 U.S. 218, 233 (1964) (enjoining state program

providing tax credits to racially discriminatory private schools was "appropriate and necessary"). In Norwood, upholding the contention that government aid to racially discriminatory private schools "in any form is in derogation of the State's obligation not to support discrimination in education," this Court pointed out that it "has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools," and cited Green v. Connally, supra -- which barred the grant of tax-exempt status to racially discriminatory

schools -- in the corresponding footnote. 413 U.S. at 463 & n.6.*

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* In Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), appeals dismissed sub nom. Cannon v. Green, 398 U.S. 956 (1970) & Coit v.Green, 400 U.S. 986 (1971) (granting preliminary injunction to plaintiffs in the class action which ultimately led to the Green v. Connally decision), the court observed that the "significance of tax deductions as supportive of the pertinent activity [racially discriminatory private schools] can hardly be gainsaid, and may, indeed, be the subject of judicial notice," and recited detailed evidence specifically demonstrating that the schools' financial viability depends on the tax benefits. 309 F. Supp. at 1134-36. See generally Surrey, Tax Incentives as a Device for Implementing Government Policy; A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 706-11 & nn. 1-2 (1970).

Even apart from its economic significance, the grant of tax-exempt status to racially discriminatory schools constitutes constitutionally barred tangible government support because tax exemptions "allow such organizations to represent themselves as having the imprimatur of the Government." McGlotten v. Connally, supra, 338 F. Supp. at 457. As the McGlotten opinion explained:

> "A contribution, even for an approved purpose, is deductible only if made to an organization of the type specified in [Internal Revenue Code] § 170 and which has obtained a ruling or letter of determination from the Internal Revenue Service. Thus the government has marked certain organizations as 'Government Approved' with the result that such organizations may solicit funds from the

general public on the basis of that approval." Id. at 456.

Accord, Falkenstein v. Department of Revenue, supra, 350 F. Supp. at 889.*

* The Falkenstein decision also noted another respect in which the grant of tax-exempt status constitutes impermissible tangible government support of racially discriminatory organizations:

> "Unlike the liquor license in Moose Lodge [No. 107 v. Irvis, 407 U.S. 163 (1972)], tax exemptions for fraternal organizations benefit both the State and the organizations. Oregon relieves fraternal organizations from the burden of ... taxes and in return, the public benefits from the charitable and benevolent activities of these organizations. This is the kind of 'symbiotic relationship' that was lacking in Moose Lodge, supra, at 175 ...."

III. THE FIRST AMENDMENT RELIGION CLAUSES DO NOT ENTITLE ANY RACIALLY DISCRIMINATORY SECTARIAN SCHOOLS TO GOVERNMENT SUPPORT THROUGH TAX-EXEMPT STATUS.

A. The Free Exercise Clause Does Not Entitle Petitioners to Government Support for Their Religious Practice of Racially Discriminatory Education.

The withdrawal of government support, through tax benefits, for petitioners' race discrimination does not burden any religious belief or practice. Moreover, even assuming arguendo that this withdrawal did impose some such burden, it would be heavily outweighed, in the balancing analysis applicable to a free exercise claim, by the compelling national interest in eliminating government support for race discrimination

in education. E.g., Gillette v. United States, 401 U.S. 437, 462 (1971) ("The incidental burdens [on religious beliefs] felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned.").

1. The I.R.S. rule does not burden petitioners' religious beliefs or practices.

Consistent with its articulated religious beliefs, petitioner Bob Jones University refuses to admit, and also expels, any person engaging in an interracial marriage or dating relationship, or participating in a group advocating such relationships.

Petitioner Goldsboro Christian Schools, which refuses to admit blacks, claims a religious belief "that separation of the races is scripturally mandated." (Goldsboro's brief at 9)*

In stark contrast with cases where this Court has sustained free exercise claims, these consolidated cases involve neither the outright governmental ban of any religious belief or practice,** nor the require-

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* Because the Goldsboro case was disposed of by summary judgment, the lower courts had to assume the sincerity of the asserted belief. The Fourth Circuit noted, however, that although Goldsboro's asserted belief "would seemingly require the exclusion of all noncaucasians .... [n]evertheless, [Goldsboro] has on occasion accepted noncaucasians ...." (Pet. 7a).

** E.g. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

ment that, in order to receive a government benefit, petitioners abandon any religious belief or practice.* The I.R.S. rule does not directly compel petitioners, under threat of criminal or civil sanctions, to embrace any repugnant religious belief or to abandon any religiously motivated practice. Moreover, in sharp distinction to the statute at issue in Sherbert v. Verner, 374 U.S. 398 (1963), the I.R.S. rule does not indirectly compel any such result by conditioning a government benefit on the abandonment of religious beliefs or practices.

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* E.g. Thomas v. Review Board, 49 U.S.L.W. 4341 (April 6, 1981); Sherbert v. Verner, 374 U.S. 398 (1963).

Petitioners do not jeopardize their tax-exempt status by teaching separation of the races or whatever else they choose; petitioners remain free "to inculcate whatever values and standards they deem desirable." Runyon v. McCrary, 427 U.S. 160, 177 (1976). Bob Jones University's tax-exempt status is not conditioned upon any violation of the only religious duty it asserts -- namely, to eschew interracial marriages and dating relationships; Bob Jones does not assert any religious duty to shun racially integrated schools. See Brown v. Dade Christian Schools, Inc., supra, 556 F.2d at 322 (despite injunction prohibiting the school's racial discrimination,

"Dade Christian students, like everyone else, remain free to marry whom they choose [and] Dade Christian parents remain free to teach their children that interracial marriage violates religious commands"). Similarly, Goldsboro's tax-exempt status is not conditioned on abandonment of the practice dictated by the religious belief which it asserts -- namely, complete separation of the races; even apart from the I.R.S. rule, the realities of twentieth-century American life preclude Goldsboro's constituency from realizing wholesale separation from individuals of other races. In choosing to live in a society which abhors any notion of apartheid, Goldsboro students

and their parents voluntarily accept racial integration in most aspects of their daily lives -- for example, in transportation, restaurants, neighborhoods and housing.*

2. The compelling national interest in eliminating government support for racially discriminatory education would outweigh any resulting burden on petitioners' religious practices

Even assuming arguendo that the I.R.S. rule imposed a burden on petitioners' religiously-dictated

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* See Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.S.C. 1966), aff'd in part and rev'd on other grounds, 377 F.2d 433 (4th Cir. 1967), aff'd and modified on other grounds, 390 U.S. 400 (1968) (religious belief in separation of races does not justify white restaurant owner's refusal to serve black patrons).

racially discriminatory practices, petitioners would still have no viable free exercise claim, because "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board, 49 U.S.L.W. 4341, 4344 (April 6, 1981).

Applying this balancing analysis, the Court has upheld government rules imposing far greater burdens on religious liberty, even where the countervailing government interests were not nearly so compelling as those advanced here -- the constitutional mandate against government support of race discrimination in education and the national commitment

to eradicate race discrimination from our society. E.g., Prince v. Massachusetts, 321 U.S. 158 (1944) (government interest in protecting welfare of minors held sufficiently compelling to justify criminal statute prohibiting minors from fulfilling religious duty to distribute religious literature). Accord, Cleveland v. United States, 329 U.S. 14 (1946); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1898). In each of the foregoing cases this Court upheld not merely minor burdens on, but outright government bans of, religiously dictated conduct which "posed a substantial threat to public

safety, peace or order." Sherbert v. Verner, supra, 374 U.S. at 403.

A fortiori, the I.R.S. rule which contains no such ban must be upheld since the conduct at which it is aimed -- government support of racially discriminatory schools -- poses uniquely substantial threats to our social fabric. The compelling national interest in eliminating such government support, discussed above has expressly been held to override free exercise claims. As Judge Goldberg pointed out in Brown v. Dade Christian Schools, Inc., supra, none of the government interests which this Court has previously held sufficient to overcome free exercise claims -- in stark contrast to the interest here --

has risen to constitutional stature. Referring to the national interest in eliminating race discrimination in education, he concluded in words even more strongly applicable here (with regard to eliminating government support of such discrimination):

> "A more compelling governmental interest has perhaps never been enlisted in opposition to a free exercise claim." 556 F.2d at 323.*

The challenged I.R.S. rule constitutes the only possible means --

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* Accord, Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring); Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1152 n.10 (4th Cir. 1980); Green v. Connally, supra, 330 F. Supp. at 1163, 1167; Newman v. Piggie Park Enterprises, Inc., supra, 256 F. Supp. at 945.

and hence the least restrictive means -- for eliminating the government support of tax benefits, for racially discriminatory schools.* The purported "less restrictive alternative" Goldsboro proposes -- a series of § 1981 actions (Goldsboro's brief at 42-43) -- ironically would impose far greater burdens upon free exercise than does the challenged rule, since the possible relief could

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* It should also be stressed that the challenged I.R.S. rule makes a reasonable and appropriate accommodation of free exercise rights, consistent with the "least restrictive means" test, by providing that a school which "selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis." Rev. Proc. 75-50, § 3.03.

include injunctions totally proscribing private schools' religiously motivated discriminatory practices.

B. The Denial of Government Support, Through Tax Benefits, for All Racially Discriminatory Schools is Completely Consistent with the Establishment Clause.

Here, as in Gillette v. United States, 401 U.S. 437, 450 (1971), "[t]he critical weakness of petitioners' establishment claim arises from the fact that [the challenged rule], on its face, simply does not discriminate on the basis of religious affiliation or religious belief ...." Thus, petitioners here, as in Gillette, are forced to argue instead that the rule constitutes a

"de facto discrimination among religions," or what the Court has termed a "religious gerrymander." 401 U.S. at 452. Specifically, petitioners claim that the I.R.S. rule operates as an impermissible de facto discrimination in favor of schools whose religious tenets do not require racially discriminatory education. However, the Court should reject this argument for the same reason it rejected the parallel argument in Gillette: that the rule according conscientious objector status only to those whose religious beliefs condemned all wars constituted an impermissible de facto discrimination against those whose religious beliefs condemned only unjust wars. Here,

as there, "a neutral, secular justification for the lines ... drawn" defeats the Establishment Clause claim. 401 U.S. at 460.* Indeed, as discussed above, the secular objective here is not merely "entirely appropriate for governmental action,"** but moreover, is constitutionally required.

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* Accord, Committee for Public Education & Religious Liberty v. Nyquist, supra, 413 U.S. at 771 ("It is well established ... that not every law that confers [a] benefit upon religious institutions is, for that reason alone, constitutionally invalid"); McGowan v. Maryland, 366 U.S. 420, 442, (1961) ("The Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.").

** Tilton v. Richardson, 403 U.S. 672, 679 (1971).

In addition to reflecting a secular legislative purpose, the challenged rule also satisfies the two other tests which this Court has prescribed for avoiding Establishment Clause violations: its primary effect is not to advance or inhibit religion, and its administration does not foster excessive government entanglement with religion. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

As fully discussed in the preceding section of this brief, far from having a "primary effect" of advancing or inhibiting religion, the challenged I.R.S. rule has no significant impact whatsoever on religious beliefs or practices. Its primary

effect, consistent with its purpose, is to withdraw government support, in the form of tax benefits, from all racially discriminatory schools. In striking contrast, cases failing the "primary effect" test (as well as other tests under the Establishment Clause) characteristically involve the grant of government support to religious institutions. For example, in Nyquist, supra, the Court held that a law providing government financial assistance -- including tax benefits -- to sectarian schools "has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian ... schools." 413 U.S. at 774.

Far from leading to excessive governmental entanglement with religion, uniform application of the I.R.S. rule to all racially discriminatory schools -- including those whose discrimination is based on sincere religious beliefs -- is the best means for avoiding such entanglement.* The only governmental involvement with religious schools resulting from the I.R.S. rule is that the government must ascertain whether or not such schools maintain racially

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* It must be stressed that only excessive entanglement is prohibited, as some entanglement is inevitable. Zorach v. Clauson, 343 U.S. 306, 312 (1952). Accord, Walz v. Tax Comm'n, supra, 397 U.S. at 674 (the grant or the withdrawal of tax-exempt status both entail some government involvement with religion).

discriminatory policies. This factual determination entails only a minimal degree of entanglement, and is indistinguishable in nature from routine governmental determinations as to whether sectarian schools comply with various state-prescribed minimum requirements, such as the nature of the school's curriculum, the qualifications of its teachers, and the progress of its students. But cf. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979) (potential excessive entanglement problems arise where NLRB would have to "go beyond resolving factual issues.").

The I.R.S. determination whether any private school is in compliance with its racially non-dis-

criminatory criteria would require only occasional and minimal contacts -- which this Court has held not to constitute excessive entanglement -- as opposed to intrusive daily surveillance -- which this Court has held does constitute excessive entanglement. Compare Tilton v. Richardson, 403 U.S. 672, 678 (1971) (permitting as a "minimal contact" occasional on-site government inspection of activities conducted in government-financed sectarian school buildings) with Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (striking down because of potentially excessive entanglement a government program which would have required continuous monitoring of classroom activities in sectarian schools).

IV. IT WOULD BE UNCONSTITUTIONAL TO EXCEPT SECTARIAN SCHOOLS FROM THE CONSTITUTIONALLY MANDATED GENERAL POLICY OF DENYING TAX-EXEMPT STATUS TO RACIALLY DISCRIMINATORY SCHOOLS.

A. Such an Exception Would Violate the First Amendment's Establishment Clause.

Far from being required by the Establishment Clause -- as petitioners contend -- any religiously-based exception to the constitutionally mandated general policy of denying tax-exempt status to all racially discriminatory schools would clearly violate that very clause for two reasons: first, it would constitute government financial support of religion; and second, it would entail excessive government entanglement with religion.

To deny tax-exempt status to all racially discriminatory schools except those whose discrimination is based on sincere religious beliefs would constitute impermissible governmental "financial support" of religion, one of the "three main evils against which the Establishment Clause was intended to afford protection . . . ." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). In sustaining a state's grant of real property tax exemptions to religious organizations in Walz v. Tax Commission, supra, this Court stressed that the state. . .

> ". . . has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class

> of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups." 397 U.S. at 672-73.

In contrast, the Court has held that special tax benefits accruing only to religious institutions do violate the Establishment Clause. E.g., Committee for Public Education & Religious Liberty v. Nyquist, supra, 413 U.S. at 791-93.

To grant tax-exempt status to racially discriminatory religious schools, but not to any other racially discriminatory schools, would constitute a special tax benefit to religion of the type which Nyquist condemned under the Establishment Clause. This Court has expressly recognized "the

danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause ...." Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972).*

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* In Wisconsin v. Yoder this Court did permit a religiously-based exception to a generally enforced rule because of the unusually great threat to free exercise which would have resulted had that rule been extended to the religious group in question. But see Thomas v. Review Board, supra, 49 U.S.L.W. at 4346 (Rehnquist, J., dissenting) (exception to general rule denying state unemployment benefits to individuals who voluntarily quit their jobs, for those who so quit for religious reasons, would grant financial benefits for sole purpose of accommodating religious beliefs and thus violate Establishment Clause as interpreted in Nyquist).

Here, in contrast with Yoder and Thomas, the general rule at issue does not significantly threaten free exercise, and it promotes a

(Footnote continued)

To grant tax-exempt status only to those racially discriminatory schools whose discrimination stemmed from sincere religious beliefs would also violate the Establishment Clause by "foster[ing] an excessive government entanglement with religion." Lemon v. Kurtzman, supra, 403 U.S. at 613. The Court specifically recognized this type of impermissible entanglement in Braunfeld v. Brown, 366 U.S. 599 (1961), as a basis for rejecting the argument that the state should be compelled to make an excep-

(Footnote continued)

> more compelling government interest. Therefore, a religiously-based exception to such rule would have no independent justification, but would serve only to aid the religions in question, in clear contravention of the Establishment Clause.

tion to the challenged Sunday closing law for all sincere Sabbatarians:

> "[T]here could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees." 366 U.S. at 608-09.

The excessive entanglement which would result from permitting religiously-based exceptions to general governmental rules has been judicially invoked specifically to reject petitioners' claim: that

private schools whose racial discrimination has a religious foundation should be exempted from a rule generally applicable to racially discriminatory private schools. In his special concurrence in Brown v. Dade Christian Schools, Inc., supra, Judge Goldberg accepted the school's contention that its racially discriminatory policy was based on sincere religious belief, but nonetheless concluded that the First Amendment did not afford a defense to a § 1981 action seeking to enjoin the discrimination. His decision was grounded, in large part, on the entanglement problems which would have resulted from a contrary holding such as the one petitioners seek here:

> "[W]hen recognizing the [free exercise] claim will predictably give rise to further claims, many of which will undoubtedly be fraudulent or exaggerated ... the court must either recognize many such claims ... or draw fine and searching distinctions among various free exercise claimants. The latter course would raise serious constitutional questions .... [R]ecognizing some claims while rejecting others unavoidably forces courts to pick and choose among religions and to draw subtle distinctions on the basis of criteria with which no governmental unit should ever become entangled."* 556 F.2d at 323.

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* There is a solid factual foundation for Judge Goldberg's concern that if an exception to the general rule denying tax-exempt status to racially discriminatory schools were permitted for religiously-motivated discrimination, many schools would seek to invoke this exception. Even before this Court's decision in Runyon v.

(Footnote continued)

B. Such an Exception Would Violate the Fifth Amendment's Equal Protection Guarantee.

As discussed above, in Nyquist (413 U.S. at 792-94) this Court held that special tax benefits granted to sectarian schools violate

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(Footnote continued)

McCrary, supra (prohibiting race discrimination by private nonsectarian schools but not reaching issue of permissibility of race discrimination by sectarian schools), many private segregated schools were church-affiliated academies. Note, 82 Yale L. J. 1436, 1447 & n. 68 (1973). There is evidence that in the wake of Runyon, additional private schools may seek religious affiliation in an attempt to shield their racially discriminatory policies. See, e.g., Note, 48 U. Colo. L. Rev. 419, 421 (1977) (all-white segregationist group donated its schools to Baptist church one month after Runyon).

the Establishment Clause, and in Norwood (413 U.S. at 461-64), this Court held that the equal protection guarantee permits even less government aid to any racially discriminatory schools than the Establishment Clause permits to sectarian schools. Therefore, because excepting sectarian schools from the general denial of tax benefits to racially discriminatory schools would constitute impermissible aid for Establishment Clause purposes -- for the reasons set forth in the preceding section of this brief -- a fortiori, such an exception would constitute impermissible aid for equal protection purposes.

CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted,

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Amicus Brief

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IN THE

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OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

—v.—

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY,
Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, As *Amicus Curiae*

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FOR ARGUMENT

IN THE

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UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position requesting this Court to affirm the decisions below that the Commissioner of Internal Revenue correctly withdrew charitable tax-exempt status from Petitioners.

Consent to file the attached brief has been sought from the parties, but Petitioner Bob Jones University has withheld consent. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civil service organization of American Jews. The Anti-Defamation League

was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States.

The Anti-Defamation League is one of the leading organizations in the United States devoted to combating anti-Semitism and to promoting racial and ethnic harmony generally. The organization has filed numerous *amicus* briefs in this and other Courts in the interest of securing the human rights of all Americans. The Anti-Defamation League is national in scope. It brings to the issues raised in this case the perspective of a national organization dedicated both to the eradication of racial discrimination and the fostering of religious freedom.

The Anti-Defamation League seeks to submit the accompanying brief because it believes this case presents to the Court a serious challenge to the authority of the United States Government to refuse to assist educational organizations that concededly practice racial discrimination.

Respectfully submitted,

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BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE*

Amicus respectfully submits that the judgments of the United States Court of Appeals for the Fourth Circuit in the above-captioned cases should be affirmed.

Interest of the *Amicus Curiae*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of the B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, the ADL has filed briefs *amicus curiae* opposing practices and policies which impair the integrity and self-respect of individuals of all races. Briefs have been filed in such cases as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Runyon v. McCrary*, 427 U.S. 160 (1976).

The ADL also supports the right of all groups to practice their religion free from unjustified governmental interference. The ADL has filed briefs in *Sherbert v. Verner*, 374 U.S. 398 (1963), and other cases before this Court in support of these vital First Amendment rights.

In the cases now before it, the Court is asked to decide whether the Commissioner of Internal Revenue properly exercised his discretion in withdrawing tax exempt status from two religious schools that concededly practice racial discrimination. As an organization committed to the right of all citizens to enjoy civil rights under law, the ADL believes that racial discrimination may be not tolerated, even under the mantle of religious freedom. In curtailing governmental assistance to these discriminatory schools, the Commissioner has exercised an appropriate discretion and has fulfilled a clear Congressional mandate.

The ADL respectfully submits that the Commissioner's actions in this case should be upheld.

Questions Presented

1. Did the Commissioner of Internal Revenue properly exercise his discretion in withdrawing charitable status under the Internal Revenue Code of 1954 (the "Code") to two concededly racially discriminatory schools, where the Congress which adopted the relevant statutes intended to grant favorable tax treatment only to institutions that serve the public interest and where subsequent sessions of Congress have ratified the Commissioner's actions?

2. Does the decision of the government not to support religious educational organizations practicing racial discrimination (a) constitute an impermissible interference with their rights to exercise freely their religious beliefs, and (b) constitute an impermissible establishment of religions that do not practice such discrimination?

Summary of Argument

I. Congress did not intend to grant favorable tax treatment under sections 501(c)(3) and 170 of the Code to each and every organization that fancies itself to be "charitable," "educational" or "religious." To the contrary, only organizations that serve the public interest were the intended beneficiaries of tax-exempt status. In withdrawing the tax exemptions of the two petitioners, Bob Jones University ("Bob Jones") and Goldsboro Christian Schools, Inc., ("Goldsboro Christian"), the Commissioner properly followed Congress' mandate; the public interest in eradicating racial discrimination—articulated by Congress and this Court—is fundamental and compelling, and is ill-served by extending benefits to racially discriminatory schools. Moreover, since the Commissioner announced that tax exemptions would not be available to institutions practicing racial discrimination, Congress has ratified his position, on several occasions, and in the plainest of terms.

II. The Commissioner's withdrawal of tax benefits was neither an infringement of religious freedom nor the establish-

ment of religion. Whatever impact the withdrawal may have on Bob Jones and Goldsboro Christian is more than amply justified by the governmental interest in eradicating racial discrimination. Moreover, the Commissioner's ruling is facially neutral, secular in its principal purpose and effect, and does not excessively entangle the government with religion.

ARGUMENT

POINT I

THE COMMISSIONER ACTED WITHIN HIS STATUTORY AUTHORITY IN WITHDRAWING TAX-EXEMPT STATUS FROM BOB JONES AND GOLDSBORO CHRISTIAN

In 1970, the Commissioner of Internal Revenue (the "Commissioner") promulgated a revenue ruling barring tax exemption under section 501(c)(3) of the Internal Revenue Code (the "Code") or deductibility under section 170(c) of the Code of all sums received by and given to organizations practicing racial segregation. I.R.S. News Release, July 10, 1970, 70 P-H ¶ 55,209; I.R.S. News Release, July 19, 1970, 70 P-H ¶ 55,230 (the "Ruling" or the "Commissioner's Ruling"). As the Commissioner himself has noted, the Ruling was necessary to stem the growth of "newly formed private schools [which] were absorbing white students from school districts integrated under court order . . . ." *Statement by Randolph W. Thrower Before the Ways and Means Committee on the Tax Exempt Status of Racially Discriminatory Private Schools* ("Thrower Statement"), 35 Tax Lawyer 701, 702 (1982).

The Commissioner's Ruling has accomplished its objective and is continuing to do so. As Commissioner Thrower observed, the Ruling "was expected in short order to remove the 'No Admittance' signs hung on the doors of many private secondary schools that barred entrance to certain students solely because of their race. This was accomplished almost overnight." *Thrower Statement, supra,* 35 Tax Lawyer at 708.

As will be demonstrated below, the Commissioner properly exercised his discretion in denying tax-exempt status to institutions plainly violating the fundamental national policy against racial discrimination. Moreover, actions of Congress since the time of the Commissioner's Ruling have effectively ratified his construction of the law.

A. The Commissioner has broad discretion in administering and enforcing the Code

Like all executive agencies, the Internal Revenue Service (the "IRS") has broad discretion in interpreting and implementing the laws of Congress. Judicial review of executive rule-making is traditionally deferential, *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920), particularly where IRS rules are being reviewed. Treasury regulations are generally "sustained unless unreasonable and plainly inconsistent with the revenue statutes." *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

This doctrine applies, as well, to less formal revenue rulings and procedures, such as the Commissioner's Ruling in this case. *See, e.g., United States v. Correll*, 389 U.S. 299 (1967) (upholding "rulings" of the Commissioner concerning deductibility of expenses for meals of travelling salesmen). Deference is appropriate because "Congress has delegated to the Secretary of the Treasury, not to [the courts], the task of administering the tax laws of the Nation." *Commissioner v. Portland Cement Co. of Utah*, 450 U.S. 156, 169 (1981) (citations omitted).

B. Congress intended to limit tax-exempt status to those institutions that serve the public interest

The statutes which the Commissioner was charged with enforcing provided him with sufficient latitude to exercise his administrative discretion to deny tax exempt status to racially discriminatory educational institutions. Congress intended that tax-exempt status be accorded only to those organizations that serve the public interest; it did not intend that every organiza-

tion which fashions itself as "educational" or "religious" be entitled to tax exemptions. Were it otherwise, organizations such as "Fagin's School for pickpockets," *Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971), or a school for training terrorists would be deemed "educational" and thereby be eligible for tax-exempt status.

This intent is demonstrated by the legislative history of the statutes which were ultimately codified as sections 501(c)(3) and 170. The Revenue Act of 1909 contained exemptions similar to those now found in section 501(c)(3). During the deliberations relating to this Act, a sponsor of the legislation explained the manner in which the exemptions from corporate taxation were intended to operate. As he stated, these exemptions were intended only for those institutions which were "devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse." 44 Cong. Rec. 4150 (July 6, 1909).

Similarly, in 1917, when Congress added to the Code a 15% charitable contributions provision, Senator Hollis, the sponsor of the provision, identified the purpose of such legislation expressly in terms of the public interest:

> "For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 percent, it is all devoted to that purpose." 55 Cong. Rec. 6728 (Sept. 7, 1917)

To like effect was the House Report accompanying the Revenue Act of 1938, which eliminated tax-exempt status for foreign organizations:

> "The exemption from taxation of money or property devoted to charitable purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public

> Funds, and by the benefits resulting from the promotion of the general welfare." H.R. Rep. No. 1860, 75th Cong., 3rd Sess. (1938).

Thus, by the time the specific legislation which now comprises sections 501(c)(3) and 170 was codified in the present Internal Revenue Code, the principle that tax exemptions were intended to promote the public good had been firmly entrenched. While the precise contours of the "public interest" were not delineated, the exemptions were not—and could not be—limitless.

This Court, also, has applied a public interest limitation in considering issues arising under the Code. For example, this Court has held that tax benefits may not be extended where they would frustrate "sharply defined" national or state policies proscribing particular types of conduct. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33-34 (1958). In *Tank Truck*, the Commissioner rejected taxpayer's characterizations of fines incurred for the violation of state regulatory laws as "ordinary and necessary" business expenses. This Court affirmed, on the theory that allowing the deductibility of such fines and penalties would frustrate the state's regulatory scheme in a "severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature." *Id.* at 35-36. *Accord, Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958).

C. The Commissioner's Ruling was clearly consistent with the public-interest standard intended by Congress

However difficult this public-interest standard may be to apply in other cases, there is no question that the Commissioner correctly applied the norms of public policy in this case. The Constitutional and Congressional commitment to the eradication of racial discrimination is fundamental and compelling.

For over one hundred years, the federal government has condemned racial discrimination. The national commitment to

racial equality, voiced in the Thirteenth, Fourteenth, and Fifteenth Amendments, has been affirmed repeatedly by this Court during the past thirty years. Since *Brown v. Board of Education,* 347 U.S. 483 (1954), this Court has consistently and vigorously advanced the goals of eliminating racial discrimination in public education and of fostering equal educational opportunities for children of all races. It was to prevent evasion of this mandate that the Commissioner promulgated the Ruling involved in this case. *See supra* p. 4.

Brown's impact has been wide-ranging, barring both state and federal officials from maintaining racially segregated school systems. *Bolling v. Sharpe,* 347 U.S. 497 (1954). Efforts to provide tuition, textbooks and other forms of financial assistance to racially segregated private schools have been firmly rejected. *E.g., Norwood v. Harrison,* 413 U.S. 455 (1973); *Poindexter v. Louisiana Fin. Assistance Comm'n,* 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968); *Lee v. Macon County Bd. of Educ.,* 267 F. Supp. 458, 475-78 (M.D. Ala.), *aff'd per curiam sub nom. Wallace v. United States,* 389 U.S. 215 (1967). Public officials have been ordered to take affirmative steps to remedy the harmful effects of segregation in education. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971); *Keyes v. School District No. 1,* 413 U.S. 189 (1973). Even purely private conduct—the denial of admission to private schools on racial grounds—has been held to violate the Congressional policy in 42 U.S.C. § 1981, which forbids discrimination in the making of contracts. *Runyon v. McCrary,* 427 U.S. 160 (1976).*

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* In *Runyon v. McCrary,* this Court expressly left open the question whether § 1981 is violated by private school discrimination which is religiously, rather than racially, motivated. 427 U.S. at 167 & n.6. The lower federal courts have, by and large, avoided the issue by finding that the discriminatory practices involved were not the product of sincerely held religious beliefs. *See Fiedler v. Marumsco Christian School,* 631 F.2d 1144 (4th Cir. 1980); *Brown v. Dade Christian Schools, Inc.,* 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978). A compelling argument can be made that § 1981 prohibits such discrimination, whatever the motive, thus flatly forbidding the prac-

There is no doubt that both petitioners here engage in racial discrimination. Goldsboro Christian refuses to admit black students under any circumstances. Since 1975, Bob Jones University has admitted blacks but has subjected its students to racially-based rules prohibiting interracial dating and marriage. As the court below correctly held, this type of discrimination on the basis of racial affiliation or companionship is as invidious as less subtle varieties. *See Tillman v. Wheaton Haven Recreational Assoc.*, 410 U.S. 431 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

The Commissioner's Ruling and its application to the petitioners in this case were consistent with the Congressional intent to grant tax-exempt status only to benefit institutions which promote the public good, and to further well-settled national policy forbidding racial discrimination and the Constitutional prohibitions against segregation in public schools. His actions were reasonable and should be upheld as a proper exercise of discretion.

D. The Congress has repeatedly ratified the Commissioner's Ruling

This Court has often upheld an administrative ruling based on actions of Congress which, although less than a formal enactment of the administrative interpretation, have been found to constitute a "ratification." In this case, if the Commissioner is found to have exceeded his authority by promulgating his Ruling in 1970, that Ruling is nonetheless valid because it has been effectively ratified by Congress since that time.

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tices engaged in by Bob Jones and Goldsboro Christian. Nevertheless, the question need not be reached in this case, since the denial of tax exemption—as opposed to an outright ban on the challenged practices—does not require a finding that the schools' practices are, as a matter of law, unlawful. Moreover, the denial of tax exemption, as shown in Point II of this brief, does not violate the religion clauses of the First Amendment. (*See* pp. 17-20, *infra*).

1. The ratification doctrine

Where Congress has amended or re-enacted a statute, without altering a known administrative construction of that statute, it may be fairly said to have ratified the agency's construction. In *United States v. Rutherford,* 442 U.S. 544 (1979), for example, this Court rejected a challenge to the Food and Drug Administration's ("FDA") restrictions on the dissemination to cancer victims of the drug Laetrile. The FDA had construed the Food, Drug, and Cosmetic Act so as to cover drugs used by the terminally ill. In upholding that construction, this Court held:

> "[T]he construction of a statute by those charged with its administration is entitled to substantial deference . . . . *Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives."* 442 U.S. at 553-554 (emphasis added).

Because the FDA's construction had been "fully brought to the attention of the public and the Congress" and because "the latter has not sought to alter that interpretation although it has amended the statute in other respects," the Court held that "presumably the legislative intent has been correctly discerned." *Id.* at 554 n.10.

Similarly, in *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969), the Federal Communications Commission's "fairness doctrine" was upheld on the basis of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." 395 U.S. at 381. The Court noted, further, that Congress had "ratified" the Commission's rule with "positive legislation" embodying the concepts underlying the fairness doctrine, *id.* at 381-82, although the "fairness doctrine" itself had never been enacted into law. Further evidence of ratification was found in Con-

gress' failure to pass bills which would have modified the rule. *Id.* at 381 & n.11.

More recently, this Court applied the ratification doctrine in finding an implied private right of action under the Commodity Exchange Act ("CEA"). *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 50 U.S.L.W. 4457 (May 4, 1982). The Court noted that prior to 1974, when Congress amended the CEA in other respects, the federal courts had routinely recognized an implied private right of action under the Act. Because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change," this Court concluded that an implied right of action had been intended. 50 U.S.L.W. at 4465 n.66.

The ratification doctrine has also been applied by this Court in tax cases. For example, in *Lykes v. United States,* 343 U.S. 118 (1952), the Court held that under section 23(a)(2) of the Internal Revenue Code, a taxpayer could not deduct from his gross income the attorneys' fees paid to contest the amount of his federal gift tax. In so holding, the Court noted that 1946 Treasury Regulations had construed section 23(a)(2) to preclude such a deduction and that, since the publication of those regulations, "Congress has made many amendments to the Internal Revenue Code without revising this administrative interpretation of section 23(a)(2)." 343 U.S. at 126-27.

Similarly, in *Helvering v. Winmill,* 305 U.S. 79 (1938), this Court held that a taxpayer could not under section 23(a) deduct from his gross income brokerage commissions paid in purchasing securities. The Court relied, in part, upon Treasury Regulations promulgated under the 1916 income tax law—regulations whose interpretation "reappeared . . . under succeeding tax statutes." 305 U.S. at 82. The Court then applied the ratification doctrine:

> "In the period since 1916 statutes have from time to time altered allowable deductions, but it is significant that

Congress substantially retained the original taxing provisions on which these regulations have rested.

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law." *Id.* at 83 (footnote omitted).*

2. Congress has ratified the Commissioner's Ruling in this case

In this case, Congress has plainly ratified the Commissioner's construction of section 501(c)(3). Indeed, the evidence of ratification is more compelling than in any of the cited cases.

In 1976, some six years after the Commissioner's Ruling, Congress added what is now section 501(i) to the Code, denying tax-exempt status to social clubs which discriminated on the basis of race, color or religion. In doing so, Congress left untouched—and thus ratified—the construction of section 501(c)(3) contained in the Commissioner's Ruling. Moreover, in footnote 5 to both the House and Senate Reports accompanying the bill proposing section 501(i), the anti-discrimination principle announced first in *Green v. Connally, supra,* and later codified by the Commissioner, was cited as a reason for enactment of the new section:

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* Also applying the ratification doctrine are *Fribourg Nav. Co. v. Commissioner,* 383 U.S. 272, 283 (1966) (rejecting ad hoc position of Commissioner in light of longstanding regulations concerning depreciation); *Cammarano v. United States,* 358 U.S. 498, 510-11 (1959) (upholding regulations concerning the deductibility of lobbying expenses); *United States v. Leslie Salt Co.,* 350 U.S. 383, 396-97 (1956) (ad hoc position of Treasury Department concerning documentary stamp taxes for corporate notes cannot stand in light of prior longstanding and consistent regulations); *Corn Products Co. v. Commissioner,* 350 U.S. 46, 53 (1955) (upholding regulations concerning the tax treatment of commodities futures transactions).

> "Also, the Supreme Court has affirmed (*Coit v. Green*, 404 U.S. 997 (1971)) a decision (*Green v. Connally*, 330 F. Supp. 1150 (D.C., D.C. 1971)) that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (Sec. 501(c)(3)) and also with its status as a charitable contribution donee (Sec. 170(c)(2))." S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976); H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).

Congress continued to adhere to the same view—that racial discrimination was inconsistent with tax exemption—when it amended section 501(i) in 1980 to exclude from coverage certain religiously-affiliated fraternal societies and alumni clubs. The Senate Report, accompanying the version of the amendment which was ultimately enacted, made clear that the principle underlying both *Green* and the Commissioner's Ruling would be preserved, even where religion was involved:

> "Such clubs will continue to be eligible for exemption provided the religious limitation on membership is designed in good faith, to further the teachings or principles of that religion, and not for the purpose of excluding individuals of a particular race or color. The provision is intended to benefit Catholic Alumni Clubs, but it is not intended to authorize discrimination on the basis of race under the guise of religious affiliation." S. Rep. No. 96-1033, 96th Cong., 2d Sess., at 10 (1980).

Further evidence of ratification is to be found in Congressional pronouncements in 1979, during the debate on two Treasury bill amendments, incorporated in the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74 §§ 103, 615, 93 Stat. 559, 562, 576-77 (1979). These amendments denied to the Treasury Department the funds to enforce certain guidelines intended to identify racially discriminatory schools more effectively. The first of these amendments, introduced by Congressman Ashbrook (the

"Ashbrook amendment"), denied the IRS any funds to formulate or carry out any guidelines promulgated on or after August 22, 1978 which would jeopardize any private school's tax-exempt status. The second, offered by Congressman Dornan (the "Dornan amendment"), withheld funds for enforcement of two specific regulations proposed by the IRS in August 1978 and February 1979.*

Far from indicating Congress' disapproval of the Commissioner's Ruling, as some of the briefs in this case contend, these amendments provide additional evidence of Congress' ratification of the IRS' denial of tax-exempt status to racially discriminatory institutions.** While the sponsors of these amendments took exception to the newly proposed IRS procedures, they made quite clear that they intended to leave untouched existing IRS regulations—including the Commissioner's Ruling involved in this case. Representative Ashbrook stated:

> "The thing to reemphasize is that my amendment would not in any way interrupt [the IRS'] continued case-by-case

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* The new guidelines proposed in August 1978 provided that any school formed or substantially expanded at the time of local public school desegregation and having a minority enrollment of less than one fifth of the percentage of the community's minority school-age population would be presumed discriminatory. The IRS would characterize these schools as "reviewable" and would require the schools to rebut a prima facie case of intentional discrimination. In February 1979, in response to strong public reaction, the Commissioner released a set of revised guidelines which contained less rigid criteria than those initially proposed. *See generally* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 Harv. L. Rev. 378, 382-83 (1979).

** The fact that the Dornan and Ashbrook amendments limited the IRS' authority after 1978 does not dilute their significance as ratifications of the Commissioner's Ruling. In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), this Court held that Congress had ratified the fairness doctrine by citing an amendment to section 315 of the Communications Act which *excepted* certain broadcasts from the statute's equal time provisions. 395 U.S. at 380.

> process which they were using up until August 22 and from which point they are going to change.
>
> . . .
>
> "As I pointed out, under their current regulation 7450 [sic], they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax exempt status. I am not trying to take that away." 125 Cong. Rec. H5882 (daily ed. July 13, 1979).

Representative Dornan made the same point.

> "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50." *Id.* at H5982 (daily ed. July 16, 1979).

Other supporters of the amendments confirmed that the IRS had the authority to promulgate the anti-discrimination procedures in effect prior to 1978. *See, e.g., id.* at S11851 (daily ed. Sept. 5, 1979) ("[T]he IRS will still be able to continue denying schools their tax-exempt status on a case-by-case method which is the proper denial approach.") (Sen. McClure); *id.* at H5885 (daily ed. July 13, 1979) ("At the present time, IRS has more than adequate authority to strip away the tax-exempt status of private schools that practice racial discrimination and I know this authority has been used effectively in a number of cases. The intelligent and sensible thing to do would be to leave it at that.") (Rep. Dickinson); *id.* at H5982 (daily ed. July 16, 1979) ("Many question whether IRS has the need or authority to establish and enforce such new and extensive rules. No one is saying that we should allow tax breaks for segregated schools, but IRS already has significant authority to act, and indeed, has done so in the past, where evidence of discrimination exists.") (Rep. Miller).*

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* Still other proponents stated that they opposed only the 1978 regulations—not the IRS' general authority to deny tax benefits to

Several years later, during the debate on the Treasury, Postal Service and General Government Appropriations Bill of 1982, the sponsors of the amendments once again acknowledged the validity of IRS Regulations that were in effect prior to 1978 and stressed that those regulations would not be affected by the proposed appropriations legislation. Once again, Representative Ashbrook stated:

> "IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS' ability to withdraw the tax exempt status of any school which might violate the law." 127 Cong. Rec. H5395-96 (daily ed. July 30, 1981).

Representative Lott of Mississippi confirmed that the IRS had the authority to enforce its pre-1978 regulations:

> "The validity [of *Green v. Connally*] is in no way challenged by this amendment. The IRS remains free to deny exemptions to any school proven guilty of discrimination . . .
>
> "If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978." *Id.* at H5397-98 (daily ed. July 30, 1981).

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racially discriminatory private schools. *See, e.g., id.* at S11853 (daily ed. Sept. 5, 1979) (Sen. Laxalt); *id.* at H5881 (daily ed. July 13, 1979) (Rep. Campbell); *id.* at H5883 (daily ed. July 13, 1979) (Rep. Sensenbrenner); *id.* at H5884 (daily ed. July 13, 1979) (Rep. Hammerschmidt).

Finally, if further evidence of ratification is needed, it can be found in the failure of Congress to pass any one of the many bills proposed since 1970 which sought to modify the principle that a racially discriminatory school is not eligible for tax exemption under 501(c)(3) or for deductible charitable contributions under section 170.* *See Red Lion Broadcasting Co., supra,* 395 U.S. at 381 & n.11.

POINT II

THE COMMISSIONER'S WITHDRAWAL OF TAX EXEMPTIONS FROM BOB JONES AND GOLDSBORO CHRISTIAN DOES NOT VIOLATE THE SCHOOLS' RELIGIOUS FREEDOM

Relying on findings of trial courts that their racially discriminatory practices are the product of genuine religious beliefs, petitioners contend that the federal government must continue to confer tax-exempt status to them or run afoul of the religion clauses of the First Amendment. The argument is specious. The protection afforded by the Constitution to the practice of all religions does not require the government to support activities which the Constitution, the Congress and the courts have found to be repugnant to our society.

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* H.R. 68, 92d Cong., 1st Sess. (January 22, 1971); H.R. 2352, 92d Cong., 1st Sess. (January 25, 1971); H.R. 5350, 92d Cong., 1st Sess. (March 2, 1971); H.R. 1394, 93d Cong., 1st Sess. (January 6, 1973); S.103, 96th Cong., 1st Sess. (January 15, 1979); H.R. 1002, 96th Cong., 1st Sess. (January 19, 1979); H.R. 1905, 96th Cong., 1st Sess. (February 8, 1979); S.449, 96th Cong., 1st Sess. (February 22, 1979); S.995, 96th Cong., 1st Sess. (April 9, 1979); H.R. 332, 97th Cong., 1st Sess. (January 9, 1981); H.R. 95, 97th Cong., 1st Sess. (January 5, 1981); H.R. 802, 97th Cong., 1st Sess. (January 9, 1981); H.R. 5186, 97th Cong., 1st Sess. (December 11, 1981).

A. The withdrawal of tax benefits does not abridge the free exercise of religion

The free exercise clause of the First Amendment prohibits the government from imposing unreasonable burdens on the practice of religion. But the freedom to practice one's religion is not unlimited. "[T]he [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Limitations on religious exercise may be justified by a compelling secular interest, provided that no less restrictive means of achieving that interest is available. *See Thomas v. Review Board*, 450 U.S. 707, 718 (1981).

As is discussed elsewhere in this brief (*see* pp. 7-9, *supra*), the governmental interest in eradicating racial discrimination is among the most compelling in our society today. It is far more significant than those which this Court has cited in the past in upholding restrictions on the practice of religious beliefs. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599 (1961) (the interest in a uniform day of rest is sufficient grounds for denying an Orthodox Jewish merchant an exemption from Pennsylvania's Sunday closing law); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (the public interest in the health and well-being of minors justifies an outright ban on the public sale of religious periodicals by minor members of the Jehovah's Witnesses); *Reynolds v. United States*, 98 U.S. 145 (1878) (interest in maintaining public morality justifies restricting Mormons from following their religiously-based practice of polygamy). *Cf. Cleveland v. United States*, 329 U.S. 14 (1946) (upholding Mann Act conviction of Mormon fundamentalist who crossed state lines with his wives); *Davies v. Beason*, 133 U.S. 333 (1890) (upholding Idaho statute prohibiting Mormon polygamists from voting).

Moreover, while denial of tax-exempt status may pose hardships to Bob Jones and Goldsboro Christian, it does not

directly prohibit the actual practices of religious beliefs, as would a statute banning polygamy. Petitioners remain free to teach their doctrines about the separation of the races. Their members individually may still conduct their private affairs in a manner consistent with the teachings of their religion. Indeed, terminating the grant of tax benefits to petitioners is the least restrictive way in which the government could end its involvement with practices that it could not constitutionally engage in itself. *See, e.g., Norwood v. Harrison*, 413 U.S. 455 (1973).

B. The withdrawal of tax benefits does not constitute the establishment of religion

Petitioners also contend that the Commissioner's Ruling effectively establishes those religions that do not practice racial discrimination and will require the government to scrutinize, and thus be impermissibly entangled with, the operations of religious institutions. Governmental actions, however, do not violate the Establishment Clause if they have a secular purpose, if their principal or primary effect neither advances nor inhibits religion and if they do not foster an *excessive* entanglement with religion. *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). These criteria have been satisfied in this case.

First, the Commissioner's Ruling clearly reflects a secular legislative purpose. Sections 501(c)(3) and 170 are intended to benefit institutions which promote the public good. *See, supra*, pp. 5-7. More specifically, the Commissioner's Ruling also promotes a secular purpose—to deny government support, in the form of significant tax benefits, to racially discriminatory organizations. *See Gillette v. United States*, 401 U.S. 437 (1971) (Congressional decision to exempt from draft registration only those conscientious objectors who object to all wars is supported by a secular purpose).

Second, the application of the Commissioner's Ruling neither advances nor inhibits religion. The Ruling has, at most,

the incidental effect of favoring those churches that do not practice racial discrimination, which is hardly sufficient to raise issues of constitutional dimensions. Many laws and regulations have *some* incidental effect on religious practices, but they cannot for that reason alone be said to violate the Establishment Clause. *See e.g., Reynolds v. United States, supra* (prohibition of polygamy does not establish monogamous religions); *Prince v. Massachusetts, supra* (prohibition of the sale of religious materials by minors does not establish religions which do not encourage this practice). As the Court of Appeals held below, the Establishment Clause "does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." 639 F.2d at 154. *See Gillette v. United States, supra,* 401 U.S. at 454-58.

Finally, the Commissioner's Ruling does not require an excessive entanglement with religious organizations. The IRS is obliged to determine simply whether petitioners maintain racially discriminatory policies, a determination that can be made by examining admissions policies, a relatively objective criterion. *See* Rev. Proc. 75-50, 1975-2 C.B. 587. The IRS need not evaluate a school's curriculum or the qualifications of its teachers. *See Tilton v. Richardson,* 403 U.S. 672, 678 (1971) (occasional on-site inspection of activities conducted in sectarian school buildings constituted only a "minimal contact"). And it need not determine whether the discrimination it finds is the product of a sincerely held religious belief. Indeed, the adoption of a rule exempting only those schools whose discriminatory practices are based on such religious beliefs would result in a far more excessive, and probably unconstitutional entanglement in the affairs of those schools. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979) (NLRB efforts to distinguish "completely religious" schools from those that are merely "religiously associated" raise serious entanglement problems).

Conclusion

Racial discrimination in education violates one of the most important policies of this nation. The determination of the Commissioner of Internal Revenue—that private schools practicing racial discrimination, and thus seeking to elude the *Brown* decision, are not entitled to tax exemption—was well within his discretion. That such practices may be the product of religious beliefs is not dispositive, for petitioners' right to act upon those beliefs must give way to the government's compelling need to enforce fundamental national policy.

Accordingly, *amicus* urges that the judgments of the Court of Appeals in these cases be affirmed.

Respectfully submitted,

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Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

WILLIAM T. COLEMAN, JR.*
Amicus Curiae, invited by Court, per Order of April 19, 1982

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AMICUS CURIAE'S COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Do Sections 501(c)(3) and 170 of the Internal Revenue Code authorize recognition of tax benefits for private schools that discriminate on the basis of race in the admission of students and adhere to other racially discriminatory policies and practices?

2. Does the recognition of tax-exempt status and eligibility to receive tax-deductible contributions for racially discriminatory private schools violate the Government's constitutional obligation to steer clear of giving significant aid to schools that practice racial discrimination?

3. Does the First Amendment require that private schools which practice racial discrimination because of religious beliefs be afforded tax benefits under Sections 501(c)(3) and 170 of the Code even though such benefits are properly withheld from schools that claim no religious basis for their racially discriminatory policies?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 81-1 and 81-3

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

PRELIMINARY STATEMENT OF *AMICUS CURIAE*

The Internal Revenue Service has ruled that §§ 501(c)(3) and 170 of the Internal Revenue Code do not authorize recognition of tax benefits for racially discriminatory private schools. Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Rul. 75-231, 1975-1 C.B. 158. The Government has defended this well-established position successfully in the Court of Appeals and previously before this Court, but the present Administration, without any

change in the Code, now contends that the IRS position is unauthorized. This Court therefore appointed an *amicus curiae* to defend the judgments below. A summary of the pertinent facts leading to that development is appropriate to explain the interest that *amicus curiae* has thereby come to represent.

These cases stem from the denial of tax-exempt status under § 501(c)(3) of the Internal Revenue Code of 1954 (the "Code"), 26 U.S.C. § 501(c)(3), to petitioners Goldsboro Christian Schools, Inc. ("Goldsboro") and Bob Jones University ("Bob Jones") on the basis of their racially discriminatory practices. Goldsboro denies admission to all black applicants. J.A. 9. Bob Jones denied admission to all blacks prior to 1971 and to all unmarried blacks until 1975, the last tax year in question. J.A. A32-33. It continues to deny admission to persons who marry or date outside their race and to enforce other racially discriminatory rules. J.A. A197, A208.

Petitioners instituted separate tax refund actions.[1] The district court in *Goldsboro* ruled for the Government and entered judgment against Goldsboro in the amount of $116,190.99 for federal social security ("FICA") and unemployment ("FUTA") taxes due. J.A. 115; 436 F. Supp. 1314 (E.D.N.C. 1977). The district court in *Bob Jones* held that the school was entitled to an exemption, relieving Bob Jones of the Government's FICA and FUTA claims totalling approximately $490,000 for the years 1970 through 1975. 468 F. Supp. 890 (D.S.C. 1978).[2]

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[1] If successful, petitioners would pay no federal income, social security or unemployment taxes, would be eligible to receive charitable contributions deductible from the donor's gross income or estate, and would be included in the IRS publication of organizations having advance assurance of eligibility for charitable contributions.

[2] In a separate action filed following the district court's decision, Bob Jones obtained preliminary injunctive relief compelling the IRS to restore its tax-exempt status under § 501(c)(3) and to provide advance assurance of the deductibility of contributions under § 170 by including Bob Jones in the Cumulative List of Organizations published by the IRS. J.A. A3; Pet. App. A72-86. This order was

The district court concluded that Bob Jones' "primary purpose is religious," but also found that it "serves educational purposes." 468 F. Supp. at 895. Bob Jones' present assertion that it is exclusively a religious organization, B.J. Br. at i, is not supported by the record, which shows that the school provides accredited, secular instruction at all grade levels, offering courses in mathematics, science, fine arts, history, education, literature, business administration and other subjects. See, *e.g.*, J.A. A63, A127-28, A227; U.S. Br. at 2-3. Goldsboro concedes that it is an educational organization. G. Br. at i, 8.

On appeal, the United States Court of Appeals for the Fourth Circuit held in both cases that § 501(c)(3) does not authorize the granting of tax-exempt status to racially discriminatory schools, regardless of the religious basis for their practices, and that denial of this tax benefit does not infringe upon First Amendment religious freedoms. *Bob Jones*, 639 F.2d 147 (4th Cir. 1980); *Goldsboro*, No. 80-1473 (4th Cir. Feb. 24, 1981) (per curiam) (Pet. App. 1a-3a).

Petitioners sought review here. In response, the Government argued that the Fourth Circuit decisions were correct but urged the Court to grant the petitions for *certiorari* in order to "dispel the uncertainty surrounding the propriety of the Service's ruling position and foster greater compliance on the part of the affected institutions." U.S. Br., Sept. 9, 1981, at 17. The petitions were granted on October 13, 1981.

Just before its brief on the merits was due, however, the Administration reversed its position.[3] On January 8,

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stayed by the Fourth Circuit pending appeal. J.A. A17; Pet. App. A97-99. The appeal was later consolidated with the Government's appeal from the district court's original decision, J.A. A8, and is before this Court on Bob Jones' petition for *certiorari*.

[3] For the circumstances surrounding the change in position, see *Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearing Before*

1982, the Acting Solicitor General filed a memorandum informing the Court that the Department of the Treasury intended to initiate the steps necessary to revoke Rev. Rul. 71-447 and other pertinent rulings and to recognize § 501(c)(3) exemptions for petitioners, suggesting that these cases therefore were moot. But legal constraints made implementation of the Administration's changed position impossible. In an action against the Government in 1971, a three-judge court had rendered a declaratory judgment that racially discriminatory private schools are ineligible for tax-exempt status under § 501(c)(3) and as donees of deductible charitable contributions under § 170. *Green v. Connally*, 330 F. Supp. 1150, 1179 (D.D.C. 1971). Upon appeal by intervening white parents and school children, this Court unanimously affirmed without opinion. *Coit v. Green*, 404 U.S. 997 (1971). This declaratory judgment remains in effect and is binding on the Government.[4] Moreover, in a case involving similar issues, the Court of Appeals for the District of Columbia Circuit, on February 18, 1982, enjoined the Government from granting § 501(c)(3) tax-exempt status to any school that discriminates on the basis of race. *Wright v. Regan*, No. 80-1124, Order (per curiam).

Because of the injunction in *Wright* the United States informed the Court that it would not revoke the revenue rulings and would not grant petitioners tax-exempt status. It therefore withdrew its request that these cases be dismissed as moot and instead suggested appointment of an *amicus curiae* to support the judgments below in favor of the United States.[5] The United States filed its brief

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the House Comm. on Ways and Means, 97th Cong., 2d Sess. (1982) (*"1982 Hearing"*).

[4] 28 U.S.C. § 2201 ("declaration shall have the force and effect of a final judgment"); see *Roe v. Wade*, 410 U.S. 113, 166 (1973); Restatement (Second) of Judgments § 33 (1982).

[5] The Government and petitioners are correct in concluding that these cases are not moot. The Government has not granted exemptions under § 501(c)(3) to petitioners, nor refunded the taxes paid,

on the merits on March 3, 1982, urging reversal of the Fourth Circuit's decisions. The Court, by its order of April 19, 1982, invited William T. Coleman, Jr. "to brief and argue these cases, as *amicus curiae*, in support of the judgments below." 50 U.S.L.W. 3837. Accordingly, *amicus curiae* files this brief in support of the position heretofore taken in these and other proceedings by the United States.

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nor revoked the revenue rulings which deny such exemptions. The Administration's changed view, therefore, does not moot the litigation. *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912, 1918 n.12 (1982). Even if the Government were to implement its changed position the case would not be moot. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *Green v. Connally*, 330 F. Supp. at 1170.

The cases come to this Court on records developed through the adversary process. They are still adversarial in the operative sense because the Administration has not granted the relief petitioners seek and cannot do so while the declaratory judgment in *Green* and the injunction in *Wright* are in effect. There remains, therefore, a justiciable controversy. *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930); see *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 382-83 (1980); cf. *United States v. Lovett*, 328 U.S. 303, 306 (1946). The Court has properly invited an *amicus curiae* to present the opposing view which had been successfully argued by the Government in the court below. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968); see also *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955); *Brown v. Hartlage*, 102 S. Ct. 1523, 1526 n.1 (1982). Finally, the Court could not accept the present Administration position, vacate the judgments below and order refund of the FICA and FUTA taxes paid by petitioners without conducting an independent review of the merits. See *Rosengart v. Laird*, 405 U.S. 908 (1972); *Richmond Television Corp. v. United States*, 382 U.S. 68 (1965); *Weber v. United States*, 119 F.2d 932 (9th Cir. 1941), *aff'd per curiam by an equally divided Court*, 315 U.S. 787 (1942); *id.* at 935 (dissenting opinion); see also *Bruton v. United States*, 391 U.S. 123, 125-26 (1968); *Young v. United States*, 315 U.S. 257, 258-59 (1942).

SUMMARY OF ARGUMENT

Since *Brown v. Board of Education*, 347 U.S. 483 (1954), the actions of Congress and the decisions of this Court have expressed a fundamental national policy, derived from the Fifth, Thirteenth and Fourteenth Amendments, condemning racial discrimination in education—public and private. This Court has consistently and unequivocally ruled that government support of segregated schools "through any arrangement, management, funds, or property" is unconstitutional. *Cooper v. Aaron*, 358 U.S. 1, 19 (1958); see *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court squarely held that Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, prohibits racially discriminatory practices in private schools.

Recognizing the development of this fundamental national policy, the IRS, in light of the statutory requirements governing charitable organizations, decided in 1970 that private schools practicing racial discrimination are not entitled to tax-exempt status under § 501(c)(3) of the Code or eligible for deductible charitable contributions under § 170. See J.A. A235-239; Rev. Rul. 71-447, 1971-2 C.B. 230. Contrary to the Government's suggestion, this decision was not a reversal of previous IRS practice. Rather, given the evolution of constitutional and statutory law after *Brown*, this ruling followed inevitably from the long-standing position of the IRS that §§ 501(c)(3) and 170 provide tax benefits only for organizations charitable in the common law sense. A three-judge court upheld the denial of tax-exempt status to racially discriminatory private schools in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971). This Court's affirmance of the three-judge court ruling, *Coit v. Green*, 404 U.S. 997 (1971), was a correct decision on the merits, and nothing has occurred since which suggests any basis for overruling it. On the contrary, congressional actions since 1970 have expressly ratified the IRS ruling upheld in *Green*.

The Commissioner's obligation under the Code to deny tax-exempt status to private schools that discriminate on the basis of race is supported by several distinct but mutually reinforcing statutory grounds:

1. As the IRS ruled, § 501(c)(3) was intended to provide tax-exempt status only for charitable organizations in the common law sense. It is a basic precept of the common law that the special privileges afforded to charitable organizations are based upon their contribution to the general welfare, and thus that an organization is not entitled to charitable status if its purposes are inconsistent with law or fundamental public policy. *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1877); *Perin v. Carey*, 24 How. 465, 501 (1861). The language and legislative history of § 501(c)(3) reflect congressional intent to adopt this principle. The courts and the IRS have been guided accordingly and have long relied upon common law concepts of charity to determine the applicability of § 501(c)(3) to "educational" organizations. This long-standing construction of § 501(c)(3) was adopted by Congress when it re-enacted the Code in 1954 and again in enacting the Tax Reform Act of 1969.

In this light, there is no merit to the argument of the Government and petitioners that the term "educational" in § 501(c)(3) must be construed as entirely independent of the law of charity solely because the terms of the statutory expression "religious, charitable . . . or educational purposes" are separated by the disjunctive. This argument tears the term "educational" from its statutory context and historic origins in the common law, ignores the statute's legislative history, and disregards its long-standing judicial and administrative construction. Even in strictly grammatical terms, the more reasonable interpretation of the statute is that its specific terms provide descriptive examples of or-

ganizations that are charitable in the generic sense. See 26 U.S.C. § 170(c)(2) (defining "charitable contributions" as contributions to "religious, charitable, . . . or educational" organizations). In interpreting other Code provisions listing terms sharing a common denominator but separated by the word "or," the Court has often held that a single word in the list—here "educational"—"does not stand alone, but gathers meaning from the words around it." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); see *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979).

2. Recognition of tax-exempt status for racially discriminatory private schools, moreover, would contravene the established judicial presumption against congressional intent to allow tax benefits where they would frustrate a sharply defined governmental policy. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 33-35 (1958). Here, recognition of tax exemption would be utterly inconsistent with federal law and fundamental national policy condemning racial discrimination in public and private education, severely undermining the Court's mandate to desegregate the public schools as well as the constitutionally-based policy against government support for segregated private schools.

3. Congress has been fully aware of the IRS decision on this issue since the day it was made, and has repeatedly refused to alter the IRS ruling, even while amending § 501(c)(3) in other respects. Furthermore, in enacting § 501(i) in 1976, Congress expressly adopted the IRS decision as "national policy." S. Rep. No. 1318, 94th Cong., 2d Sess. 8 (1976). Congress recognized that the court in *Green* had held that the existing language of § 501(c)(3) barred tax-exempt status for racially discriminatory schools and thus saw no need to adopt additional language to this effect. Instead, Congress extended this policy to private social clubs practicing racial discrimination, a positive legislative action plainly signal-

ing approval of the IRS ruling on discriminatory schools. It is inconceivable that the Congress which mandated denial of tax-exempt status for discriminatory social clubs, including school fraternities, could have intended to permit discriminatory practices by the tax-exempt schools themselves. Congress reaffirmed its support for the IRS ruling in 1979 when it enacted the Dornan and Ashbrook Amendments to bar implementation of proposed new "affirmative action" requirements for private schools. A fair reading of these developments since 1970 can leave no reasonable doubt that Congress has ratified and approved the IRS policy in Rev. Ruls. 71-447 and 75-231. *Haig v. Agee*, 453 U.S. 280, 300-01 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969).

Indeed, if § 501(c)(3) were construed to permit tax exemptions for racially discriminatory schools, the provision would be unconstitutional under the Fifth Amendment. The Government has an affirmative constitutional duty to steer clear of providing significant aid to such schools, even in the absence of any purpose to further the schools' racially discriminatory practices. *Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

For all these reasons, the IRS properly concluded that racially discriminatory private schools are not entitled to exempt status under § 501(c)(3). There is no question that both petitioners engage in racially discriminatory practices. While Bob Jones argues that it is entitled to exempt status under § 501(c)(3) as a "religious" organization, the record demonstrates that it is not a church or seminary engaged exclusively in religious activities, but rather a school providing accredited secular education at all levels.

Ultimately, petitioners argue that the First Amendment's protection of religious freedom requires that they

be excepted from the rulings barring tax-exempt status for all other racially discriminatory private schools. But the right to free exercise of religion does not guarantee entitlement to tax-exempt status. Rev. Ruls. 71-447 and 75-231 do not restrict petitioners' right to hold or teach their religious beliefs, nor do these rulings prevent them from continuing their discriminatory practices without the benefit of government subsidy. If there is any burden on petitioners' free exercise here, it is far outweighed by the compelling governmental interest in eliminating all forms of official support for racial discrimination in education. *Norwood v. Harrison, supra.* If the Establishment Clause has any bearing here, it is to prohibit special tax preferences for religiously-motivated racial discrimination. To give favored tax treatment to racially discriminatory sectarian schools while denying tax benefits to private schools that claim no religious basis for their racially discriminatory practices would impermissibly entangle government with religion.

Since the United States does not support petitioners on their First Amendment claims, the principal issue here, as framed by the Government, is whether the Court should overrule *Coit v. Green* and the Commissioner's firmly established practice, ratified by Congress, of denying tax-exempt status to racially discriminatory schools. The Government states that it fully subscribes to "the strong national policy in this country against racial discrimination in any and all forms." U.S. Br. at 11. But this is an empty assurance if schools that admittedly discriminate on the basis of race are nonetheless afforded significant tax benefits. Surely, the constitutional and congressional command to eradicate the badges and incidents of slavery demands more.

ARGUMENT

I. THE IRS RULING DENYING TAX-EXEMPT STATUS TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS WAS A NECESSARY RESULT OF FUNDAMENTAL DEVELOPMENTS IN STATUTORY AND CONSTITUTIONAL LAW

On May 17, 1954, this Court established the fundamental principle that racial segregation in public education violates the Fourteenth and Fifth Amendments. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). In the intervening 28 years, the courts and Congress have spelled out a national commitment to eliminate racial discrimination from virtually all institutions of American life. Nowhere is this commitment greater than in the field of education. From *Brown*, 347 U.S. at 493, to *Washington v. Seattle School District No. 1*, 102 S. Ct. 3187, 3196 (1982), and *Plyler v. Doe*, 102 S. Ct. 2382, 2397-98 (1982), the Court has repeatedly emphasized the surpassing importance of education in providing minority groups with a meaningful opportunity to achieve their rightful place in American society, and the devastating impact that racial segregation in education can have on children subjected to it. Accordingly, as the Court held in *Cooper v. Aaron*, 358 U.S. 1, 19 (1958):

> State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.

Throughout the 1960's, Congress translated the national policy against racial discrimination into legislation reaching most areas of American society. In the

Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, Congress put the full force of federal law behind prohibitions against racial segregation in public accommodations, employment and education. See Titles IV and VI, 42 U.S.C. §§ 2000c & 2000d; see also, *e.g.*, the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq*; and the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (housing).

This Court, at the same time, recognized that the Civil Rights Acts adopted in the post-Civil War era had already made private discrimination unlawful in many walks of life. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that 42 U.S.C. § 1982 prohibits private racial discrimination in the sale or rental of property. The Court concluded that the Civil Rights Act of 1866 prohibited private interference with the enumerated rights and that this broad prohibition was within Congress' power under the Thirteenth Amendment to determine "the badges and the incidents of slavery, and . . . to translate that determination into effective legislation." 392 U.S. at 440.

The conclusion of *Jones*—that the Civil Rights Act of 1866 "operates upon the unofficial acts of private individuals," *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235 (1969)—clearly applied as well to 42 U.S.C. § 1981, a companion provision which guarantees black citizens other equal rights, including the right to make contracts. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Tillman v. Wheaton-Haven Recreation Association*, 410 U.S. 431, 439-40 (1973); *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 483 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). Thus, when in 1970 the IRS issued the ruling here challenged by petitioners, there was a sound basis upon which to conclude that racial discrimination by private schools in their admission of students violated 42 U.S.C. § 1981. In *Runyon v. McCrary*, 427 U.S. 160 (1976), this Court so held. Indeed, by the time *Runyon* was decided, the Court could

state that § 1981's prohibition of racial discrimination in the making and enforcement of private contracts was "now well established," *id.* at 168, and that a segregated private school's discrimination against blacks "amounts to a classic violation of § 1981," *id.* at 172.[6]

While the national policy against racial discrimination in education, public and private, was thus being articulated, implementation of the *Brown* decision proved to be far more difficult than anticipated. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13 (1971). The widespread proliferation of segregated white private schools, often supported by substantial state assistance, seriously undermined efforts to desegregate the public schools. See *Griffin v. County School Board*, 377 U.S. 218 (1964).[7] Throughout the 1960's, the federal courts repeatedly struck down state and local efforts to provide financial assistance to such schools, usually in the form of tuition grants; this Court consistently affirmed these decisions summarily. See *Norwood v. Harrison*, 413 U.S. 455, 463 & n.6 (1973), and cases cited. In consequence, the tax benefits provided by §§ 170 and 501(c)(3) as-

[6] Although the Court has not squarely ruled on the point, concerted activity to deprive blacks of rights secured by § 1981 may constitute a criminal conspiracy under 18 U.S.C. § 241. See *Jones v. Alfred H. Mayer Co., supra*, 392 U.S. at 441-43 n.78, overruling *Hodges v. United States*, 203 U.S. 1 (1906); *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903). See also *United States v. Price*, 383 U.S. 787, 800-05 (1966). Such activity may also constitute a civil conspiracy under 42 U.S.C. § 1985(3). See *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

[7] See also *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 848-49 (5th Cir. 1966); *Green v. Kennedy*, 309 F. Supp. 1127, 1133-36 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 851, 856-57 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); U.S. Comm'n on Civil Rights, *Southern School Desegregation 1966-'67* at 70-76 (1967); *Equal Educational Opportunity: Hearings Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess. 1931 *et seq.* (1970) (*"1970 Hearings"*).

sumed a "critical significance" in enabling these schools to flourish. *Green v. Kennedy*, 309 F. Supp. 1127, 1135 (D.D.C.) (three-judge court), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970). See U.S. Commission on Civil Rights, *Southern School Desegregation 1966-'67* at 75-76 (1967); *1970 Hearings*, *supra* note 7, at 1941-43, 1954-55, 1966, 1983-84.

Thus, in 1969 black parents and students in Mississippi brought the *Green* action challenging the IRS' continued recognition of tax-exempt status for segregated private schools in that state. The three-judge court recognized that tax-deductible contributions had become the major source of funding for these private schools, providing crucial support to meet the schools' capital needs and operating expenses and thus allowing the schools to expand segregated education at the expense of the desegregated public schools. 309 F. Supp. at 1135. Finding that plaintiffs' challenge raised "grave constitutional questions," *id.* at 1133, the court preliminarily enjoined the IRS in early 1970 from continuing to recognize tax-exempt status for segregated private schools in Mississippi.

Against this background, the IRS in July 1970 concluded that it could "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination" under § 501(c)(3), "nor [could] it treat gifts to such schools as charitable deductions for income tax purposes" under § 170. J.A. A235. The IRS formally adopted this position in Rev. Rul. 71-447, 1971-2 C.B. 230, the full text of which is set out in Appendix A to this brief.[8] The IRS explained: "Both the courts and the Internal Revenue Service have long recognized that the

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[8] The IRS made clear at the outset that its position applied to all private schools, whether church-related or not. J.A. A237-239; see Rev. Rul. 75-231, 1975-1 C.B. 158. Procedures relating to enforcement of these revenue rulings were promulgated in Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587.

statutory requirement of being 'organized and operated exclusively for religious, charitable, . . . or educational purposes' was intended to express the basic common law concept [of charity]." In particular, the IRS emphasized the common law principle that an organization is not "charitable" if its purposes are illegal or contrary to fundamental national policy. The IRS found that "[t]he Federal policy against racial discrimination is well-settled in many areas of wide public interest," particularly "in education, whether public or private."[9]

This ruling was not a product of mere IRS "whim," *Bob Jones*, 468 F. Supp. at 905, nor was it simply a reaction to the preliminary injunction entered in *Green*. Rather, it was the outcome of years of serious consideration of the issue in light of the emerging national policy against racial discrimination in education. *1982 Hearing, supra* note 3, at 84, 88-97; *1970 Hearings, supra* note 7, at 2001.[10] The decision was personally approved by President Nixon, *1982 Hearing* at 84-85; *1970 Hearings* at 1998, and has been enforced consistently by every Administration until now.

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[9] Rev. Ruls. 71-447 and 75-231 remain in effect and had the support of the IRS, the agency charged with enforcement of the Code, as well as of the Tax Division of the Department of Justice, throughout the debate leading to the Administration's change in position. See, *e.g., 1982 Hearing, supra* note 3, at 153, 156, 178, 226, 256, 259, 454, 472-531.

[10] The IRS initiated its study of this issue in the late 1950's and began to implement changes regarding racially discriminatory schools in 1965. In 1969, at the urging of Congress, a blue ribbon Advisory Committee on Exempt Organizations was appointed to analyze federal law and policy governing tax-exempt organizations. The Committee's reaffirmation that tax-exempt status was intended only for organizations charitable in the common law sense, which do not violate fundamental national policy, was influential in the IRS' 1970 decision. See *1982 Hearing* at 84, 88, 90-94; *1970 Hearings* at 2001.

The IRS ruling was upheld by the three-judge court in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971). The court recognized the force of the IRS' reliance on the common law background of § 501(c)(3), *id.* at 1157-61, but rested its holding on the well-established presumption against the allowance of federal tax benefits that would frustrate other sharply defined governmental policies. *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958). Noting that *Tank Truck* held that business expense deductions were properly denied on this ground, the court stated:

> This public policy limitation on tax benefits applies *a fortiori* to the case before us, involving the charitable deduction whose very purpose is rooted in helping institutions because they serve the public good. The Internal Revenue Code does not contemplate the granting of special Federal tax benefits to trusts or organizations . . . whose organization or operation contravene Federal public policy.

330 F. Supp. at 1162. Concluding that the recognition of tax-exempt status for segregated private schools would frustrate the most fundamental and clearly established national policies, *id.* at 1163-64, the court in *Green* issued a declaratory judgment upholding the IRS' interpretation of § 501(c)(3) and granted permanent injunctive relief barring tax-exempt status for discriminatory private schools in Mississippi. Intervenors appealed, raising arguments similar to those upon which petitioners and the Government here rely. See *1982 Hearing* at 275-353. This Court affirmed per curiam, without opinion. *Coit v. Green*, 404 U.S. 997 (1971). For the reasons which follow, that decision was correct and should not now be overruled.

II. CONGRESS INTENDED TO GRANT TAX BENEFITS UNDER §§ 501(c)(3) AND 170 TO CHARITABLE ORGANIZATIONS IN THE COMMON LAW SENSE AND THUS NOT TO ORGANIZATIONS WHOSE ACTIVITIES ARE UNLAWFUL OR VIOLATE FUNDAMENTAL NATIONAL POLICIES

Section 501(c)(3) of the 1954 Internal Revenue Code, as it was in effect during the relevant period,[11] provided an exemption from federal income tax for

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .

Tax-exempt status under § 501(c)(3) controls the Code's exemption for charitable organizations from federal social security taxes, § 3121(b)(8)(B), and from federal unemployment taxes, § 3306(c)(8), the taxes directly at issue here.

Eligibility to receive tax-deductible charitable contributions under § 170 of the Code is determined in accordance with a substantially identical standard. Section 170(c)(2)(B) provides a deduction for income tax purposes for a "charitable contribution," defined to include contributions to organizations "operated exclusively for religious, charitable, scientific, literary, or educational purposes." These two closely-related provisions must be construed *in pari materia*. U.S. Br. at 14. See *Harris v. Commissioner*, 340 U.S. 106, 107 (1950); *United States v. Stewart*, 311 U.S. 60, 64 (1940).[12]

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[11] Section 501(c)(3) was amended in 1976 also to embrace organizations "to foster national or international amateur sports competition." Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730 (1976).

[12] Thirteen other provisions of the Code contain similar or identical references to "religious, charitable . . . or educational purposes"

A. The Language of §§ 501(c)(3) and 170 Reflects Their Origins in the Common Law and in English and State Tax Exemption Statutes

The operative language in §§ 501(c)(3) and 170 is derived from the earliest federal revenue statutes. The first general income tax law passed by Congress, the Tariff Act of 1894, exempted "corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes." Ch. 349, § 32, 28 Stat. 509, 556 (1894). That Act was held unconstitutional, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), and was never implemented. But in enacting a tax on corporate incomes in 1909, Congress exempted "any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual." Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 113 (1909). After the Sixteenth Amendment, Congress enacted the Tariff Act of 1913, the first modern income tax law. Chapter 16, § (G)(a), 38 Stat. 114, 172 (1913), the direct predecessor of § 501(c)(3), provided an exemption virtually identical in terms to the 1909 exemption, only adding "scientific" to the statutory phrase. The terms of the exemption have been carried forward in each subsequent income tax act without basic change.[13]

These exemption provisions are part of a long-standing practice in common law jurisdictions. The federal ex-

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in establishing exemptions from, or eligibility for deductions under, income, estate, gift and excise taxes. 26 U.S.C. §§ 170(c)(4); 501(c)(10); 642(c); 2055(a)(2) & (3); 2106(a)(2)(A)(ii) & (iii); 2522(a)(2) & (3); 2522(b)(2), (3) & (4); 4911(e)(1)(A).

[13] A deduction for charitable contributions to "religious, charitable . . . or educational" organizations, equivalent to that now contained in § 170(c), was first enacted in 1917, War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330, and has likewise been carried forward without substantial change in each succeeding income tax law.

emption has "roots reaching back to the British Statute of Charitable Uses of 1601 and to early state constitutional provisions." Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L.J. 299, 301 (1976). See Hopkins, *The Law of Tax-Exempt Organizations* § 1.2, at 5 (3d ed. 1979); Zollmann, *American Law of Charities* §§ 678, 701 (1924). Indeed, the practice of exempting charitable organizations from tax was so well settled at common law and in legislative practice that when Congress failed to enact any express exemption in the 1862 income tax law passed to help finance the Civil War, Act of July 1, 1862, ch. 119, §§ 89-93, 12 Stat. 432, 473 (1862), the Commissioner of Internal Revenue nevertheless ruled that it was not intended to apply to "[t]he income of literary, scientific, or other charitable institutions." Decision No. 110 (May 1863), *reprinted in* Boutwell, *A Manual of the Direct and Excise Tax System of the United States* 273, 275 (1863).[14]

The language of the early revenue acts is a compelling indication of congressional intent to exempt only common law charities. In enacting an exemption in 1894 for "charitable, religious or educational purposes," Congress closely tracked the principal heads of charitable organizations under the law of charity, as enumerated in Lord MacNaghten's authoritative restatement:

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes

[14] See also Act of June 30, 1864, ch. 173, § 111, 13 Stat. 223, 279 (1864) (exempting "any charitable, benevolent or religious association" from excise tax on lotteries); Treas. Regs. Ser. 4, No. 4, Special Taxes § 27 (Jan. 1868); 35 Cong. Rec. 5565 (1902) (comments of Rep. McCall on bill to exempt "religious, literary, charitable, or educational" bequests from 1898 inheritance tax: "it has always been the policy of our laws to spare" such institutions from taxation).

> beneficial to the community, not falling under any of the preceding heads.

Commissioners v. Pemsel, [1891] A.C. 531, 583. See also *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556 (1867); 4 Scott, *Law of Trusts* § 368 (3d ed. 1967); 2 Perry, *Trusts and Trustees* § 697 (2d ed. 1874). Congress, in 1894 and in subsequent enactments, did not find it necessary to define these terms, for they had been well defined by hundreds of years of legal precedent. Sol. Op. 159, III-1 C.B. 480 (1924); see Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A. J. 525, 526 (1958).[15]

The statutory phrase used in the federal exemption follows the pattern of language found at the turn of the century in the tax statute in England, where charitable organizations have been exempted since initiation of the income tax in 1799.[16] The English exemption was definitively construed in the leading case of *Commissioners v. Pemsel*, [1891] A.C. 531. See Brunyate, *The Legal Definition of Charity*, 61 Law Q. Rev. 268, 269-70 (1945). The

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[15] Cf. *International Reform Federation v. District Unemployment Compensation Board*, 131 F.2d 337, 339 (D.C. Cir. 1942) (construing equivalent provision of D.C. Code):

> That Congress had in mind these broader definitions is confirmed by the words used in the Act, for by its terms it embraces religious, charitable, scientific, literary, or educational corporations, thus including within the exemption clause every nonprofit organization designed and operating for the benefit and enlightenment of the community, the State, or the Nation—in short, to apply the exemption to those organizations commonly designated charitable in the law of trusts. Consequently, we may properly draw analogy from the trust cases.

[16] The legislative history of the Tariff Act of 1894 shows frequent reference to the English income tax. See, *e.g.*, H.R. Rep. No. 276, 53d Cong., 2d Sess. 4-5 (1894); 26 Cong. Rec. 584-88 (report on English tax law and practice from Department of State), 1609-10 (remarks of Rep. Hall: author of the proposed bill "could not have followed more closely" the English income tax legislation), 1612-14, 3562, 3781, 6612-15, 6693, Appendix 418-19 (1894).

House of Lords there considered the Income Tax Act of 1842, 5 & 6 Vict. c. 35, s. 61, No. VI., Sched. A., which exempted income from the property of "any hospital, public school,[17] or almshouse, or vested in trustees for charitable purposes." [1891] A.C. at 533. Thus, like the U.S. exemption, the English statute enumerated several specific terms along with a separate reference, in the disjunctive, to "charitable" purposes. The issue was whether the word "charitable" should be interpreted in its broad legal sense in accordance with the law of charitable trusts or in its "popular or vulgar" sense as involving only "the relief of poverty." *Id.* at 574-75, 581-82 (opinion of Lord MacNaghten).[18] As in the present case, appellants contended that the presence of the specific terms separated by the disjunctive meant the word "charitable" must be given a more limited meaning. *Id.* at 535-36 (argument of Solicitor General of Great Britain).

The House of Lords held that the statute was intended to provide an exemption "to all trusts known to the law of England as charitable uses" and expressly rejected the argument that each of the specific terms must be given a separate and independent meaning. *Id.* at 574, 587. Lord MacNaghten explained: "It is not so very uncommon in an Act of Parliament to find

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[17] The "public" school in England is roughly equivalent to the American "private" school. See Carter & Crawshaw, *Tudor on Charities* 398-99 (5th ed. 1929).

[18] In applying the Act the taxing authorities had construed the word in the broader sense for many years before reversing their position. [1891] A.C. at 574. Lord MacNaghten thought it "rather startling to find the established practice of so many years suddenly set aside by an administrative department of their own motion . . .," *id.* at 591, particularly since the former interpretation had been ratified by Parliament. "It is impossible to suppose that on every [re-enactment of the Act] . . . the Legislature can have been ignorant of the manner in which the tax was being administered . . ., especially when the practice was fully laid before Parliament." *Id.* In this sense, the present case is an instance of history repeating itself. See *infra* at 48-57.

special exemptions which are already covered by a general exemption." *Id.* at 589. He thought it "plain on the very words of Sched. A., that the Legislature considered the purposes of a public school to be charitable, and a public school to be a trust for charitable purposes, just so much as an almshouse or a hospital." *Id.* at 587-88.[19] Immediately upon enactment of the 1913 federal income tax, *Pemsel* and other precedents defining the common law of charitable organizations were relied upon by American commentators in interpreting the scope of the predecessor to § 501(c)(3). See Black, *A Treatise on Federal Taxes* § 123, at 149-50 (4th ed. 1919); Foster, *A Treatise on the Federal Income Tax under the Act of 1913* § 41, at 168-72 (2d ed. 1915).

The statutory phrase adopted by Congress also closely paralleled the practice followed by many states in the nineteenth century in exempting charitable organizations from taxation. See Fisch, Freed & Schachter, *Charities and Charitable Foundations* § 879, at 658 (1974); Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A. J. 525, 526-27 (1958). Typically, these state constitutional provisions and statutes, like § 501(c)(3), listed a series of specific purposes in addition to the term "charitable," with unexplained variations in the particular purposes listed. See, *e.g.*, Ind. Rev. Stat. ch. 98, § 8525 (1892) (exempting property used for "educational, literary, scientific or charitable" purposes); Mass. Pub. St. ch. 11, § 5 (1882) "literary, educational, charitable, scientific, or religious purposes").[20] Regardless of the particular wording em-

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[19] See [1891] A.C. at 574 (opinion of Lord Herschell) (specific terms intended merely "to quiet the fears" of those apprehensive that a particular institution may not fall within the general charitable exemption).

[20] Other early state constitutional provisions and statutes are listed in Appendix B hereto. Comparable statutes existing today in many states are referred to in Fisch, Freed & Schachter, *supra*, § 256, at 229 n.6 (1974); 42 Am. Jur. 2d *Inheritance, Estate and Gift Taxes* §§ 209, 234, 439 (1969). As Professor Scott has noted, these statutes are "randomly worded," leading to the inclusion of "general purposes

ployed, state courts had little difficulty in concluding that statutory language of this general type was intended to reflect principles established in the common law of charitable trusts.[21] See 4 Scott, *Law of Trusts* § 368, at 60 (3d ed. Interim Supp. 1981). These statutory listings of specific charitable purposes were readily understood as simply an effort to clarify the exemption through illustrative examples, and state courts have accordingly held that the particular purposes listed are not to be construed as distinct and mutually exclusive.[22] See Fisch, Freed &

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as well as specific provisions relating to certain charities which would have fallen naturally under the more general words." 4 Scott, *Law of Trusts* § 348.4, at 46 (3d ed. Interim Supp. 1981); see also *id.* § 368, at 59.

[21] *E.g., Molly Varnum Chapter, D.A.R. v. City of Lowell*, 204 Mass. 487, 492-93, 90 N.E. 893, 894 (1910); *Travelers' Ins. Co. v. Kent*, 151 Ind. 349, 351-53, 50 N.E. 562, 563-64 (1898); *M.E. Church, South v. Hinton*, 92 Tenn. 188, 190, 21 S.W. 321, 322-23 (1893); see Ross, *Inheritance Taxation* 189-92 (1912); see also Eliot, *The Exemption from Taxation* (1874), *in* 2 *Charles W. Eliot, The Man and His Beliefs* 667, 700 (1926).

The same result has been reached in modern decisions. *E.g., Stockton Civic Theatre v. Board of Supervisors*, 66 Cal.2d 13, 16-22, 423 P.2d 810, 813-816, 56 Cal. Rptr. 658, 661-64 (1967), and cases cited; *People ex rel. Doctors Hospital, Inc. v. Sexton*, 267 App. Div. 736, 741, 48 N.Y.S.2d 201, 205 (1944).

See generally 26 Rul. Case Law § 281, at 320 (Perm. Supp. ed. 1929) (exempted "educational" institutions intended to be "confined to those of the same general character as the benevolent and charitable institutions with which they are associated in the statute"); 15 Am. Jur. 2d *Charities* § 26, at 36 (1976) (statutory terms "'charitable, religious, or benevolent' purposes, or the like, . . . seem to be accorded the same meaning as in the general law of charitable trusts and donations").

[22] *Ancient and Accepted Scottish Rite of Freemasonry v. Board of County Comm'rs*, 122 Neb. 586, 595, 241 N.W. 93, 96 (1932). Rather, in that case a statute exempting property used for "educational, religious, charitable or cemetery purposes" was to be construed in accordance with the English and American law of charitable uses. *Id.* at 598-601, 241 N.W. at 97-98. A recent Massachusetts case held that the word "charitable" in the statutory phrase "civic, educational, charitable, benevolent or religious purpose" is not distinct

Schachter, *supra*, § 788, at 603 (specific purposes included "to insure that every purpose falling within the concept of charitable will be accorded exemption").

Thus, the Fourth Circuit did not overstate the matter in holding that petitioners' interpretation of the statute "tears section 501(c)(3) from its roots" in the common law. 639 F.2d at 151. This Court's decisions make clear that these obvious origins of the federal exemption may not be ignored. "Where Congress uses terms that have accumulated a settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). Where the common law roots of statutory language are apparent, it is fair "to presume that Congress would have specifically so provided" if it had not intended to follow the traditional common law interpretation. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); accord *Gilbert v. United States*, 370 U.S. 650, 655 (1962). See *McDonald v. Hovey*, 110 U.S. 619, 621 (1884) (relying on construction of similar statutes in England and the states); *Pennock v. Dialogue*, 2 Pet. 1, 18-21 (1829) (Story, J.); cf. *United States v. Euge*, 444 U.S. 707, 712-14 (1980) (relying on analogous common law duties as guide to interpretation of Code summons provision).

B. The Legislative History of §§ 501(c)(3) and 170 Demonstrates That Congress Intended to Enact an Exemption Only for Organizations Charitable at Law

The legislative history strongly reinforces the conclusion that Congress intended to enact an exemption only for organizations that are charitable in the broader com-

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from, but rather encompasses, the word "religious" and that the phrase should be interpreted by reference to "the evolved conception of the legal meaning of charity." *Congregational Church v. Attorney General*, 376 Mass. 545, 549, 381 N.E.2d 1305, 1307-08 (1978).

mon law sense.[23] Despite its use of the standard "religious, charitable or educational" language, Congress has repeatedly declared that its purpose was to exempt "charities," "charitable organizations," or "charitable contributions" generally. Thus, when in 1902 Congress enacted legislation, Act of June 27, 1902, ch. 1160, 32 Stat. 406, providing for the refund of all taxes paid on "religious, literary, charitable, or educational" bequests under the War Revenue Act of 1898, ch. 448, § 29, 30 Stat. 448, the House Ways and Means Committee explained: "[T]hese institutions embrace *the whole domain of the charities of the country.*" H.R. Rep. No. 1702, 57th Cong., 1st Sess. 2 (1902) (emphasis added). See also 35 Cong. Rec. 5565 (1902) (remarks of Rep. McCall, the bill's sponsor, describing these as "charitable bequests" and "charitable legacies"); 44 Cong. Rec. 4150 (1909) (remarks of Sen.

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[23] The Government argues that the individual word "charitable" is used in § 501(c)(3) in its narrower popular sense, meaning only "relief of the poor." U.S. Br. at 18 n.15, 20-21. But this contention does not meet the central issue. Even if the Government were correct in its interpretation of the word "charitable", the question is whether Congress intended all exempted organizations—including educational, religious and "aid-to-the-poor" organizations—to be charitable in the broader common law sense and therefore did not intend to exempt organizations whose purposes are unlawful or against fundamental national policy. In any event, the Government's position is highly doubtful because if the word "charitable" is limited to its narrower meaning, and if § 501(c)(3) as a whole does not reflect an overriding concept of charitable in the legal sense, then there remains no statutory basis for granting tax-exempt status to the many types of organizations that have been held by the IRS to be exempt even though they are not charitable in the narrower popular sense, because they do not serve primarily the poor, and do not fall within any of the other specific terms in the statute. *E.g.*, Rev. Rul. 78-85, 1978-1 C.B. 150 (preservation of public park); Rev. Rul. 76-204, 1976-1 C.B. 152 (promotion of environmental conservation); Rev. Rul. 69-545, 1969-2 C.B. 117 (hospital); Rev. Rul. 66-323, 1966-2 C.B. 216 (blood bank); Rev. Rul. 59-310, 1959-2 C.B. 146 (community recreational facilities); Rev. Rul. 55-656, 1955-2 C.B. 262 (community nursing bureau). See Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959); *infra* at 32. See also *1982 Hearing, supra* note 3, at 595.

Bacon, explaining that exemption to 1909 tax on corporate incomes, which he sponsored, exempted institutions devoted "to every charitable and just impulse").

Similarly, in 1917, during congressional debate on the proposed deduction for contributions to "religious, charitable, scientific or educational" organizations, Senator Hollis, sponsor of this provision, explained his amendment as concerning "donations . . . for charitable purposes." 55 Cong. Rec. 6728 (1917). In 1918, during re-enactment of the revenue laws, Congress described this provision as a deduction for contributions to "charitable organizations." 56 Cong. Rec. 10,426-27 (1918) (remarks of Rep. Robbins); see generally *id.* at 10,418-28. Again, in 1935, the House sponsor of the proposal to extend the deduction to corporate contributors explained that it applied to contributions "for charitable purposes." 79 Cong. Rec. 12,423 (1935) (remarks of Rep. McCormack). See also H.R. Rep. No. 1681, 74th Cong., 1st Sess. 20 (1935) (minority views); 79 Cong. Rec. 12,423-24 (1935).[24]

The legislative history also shows that Congress provided favored tax treatment to "religious, charitable or educational" organizations in recognition of the public benefits they provide. Thus, in 1917 Senator Hollis described the benefit the public derives from diverting tax dollars to charitable organizations: "For every dollar that a man contributes to these public charities, educational, scientific, or otherwise, the public gets 100 percent." 55 Cong. Rec. 6728 (1917); see *id.* at 6729. See also *Hearings on H.R. 12863 Before the Senate Comm. on Finance*, 65th Cong., 2d Sess. 223-24 (1918); *Hear-*

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[24] In addition to the sources cited above, see, *e.g.*, H.R. Rep. No. 2514, 82d Cong., 2d Sess. 16 (1952); S. Rep. No. 1631, 77th Cong., 2d Sess. 240 (1942); H.R. Rep. No. 2333, 77th Cong., 2d Sess. 166-67 (1942); S. Rep. No. 1567, 75th Cong., 3d Sess. 14 (1938); S. Rep. No. 665, 72d Cong., 1st Sess. 52-53 (1932); S. Rep. No. 52, 69th Cong., 1st Sess. 8 (1926).

ings on the Revenue Bill Before the House Comm. on Ways and Means, 65th Cong., 2d Sess. 372, 380-81 (1918); 56 Cong. Rec. 10,426-27 (1918) (remarks of Rep. Robbins: charitable contributions are encouraged because charities "supply a place which the Government cannot and will not fulfill"); 61 Cong. Rec. 5294 (1921) (remarks of Rep. Green: "The gifts must be made exclusively for public purposes"). In 1938, in connection with legislation to limit the charitable deduction to contributions to domestic organizations, the House Ways and Means Committee explained:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from the financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The United States derives no such benefit from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

Thus, Congress adopted the basic rationale in support of §§ 501(c)(3) and 170 that is found in the common law precedents explaining the special treatment afforded to charitable organizations. At common law, charitable organizations are provided special privileges because of the contribution they make to the welfare of society. See *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556 (1867); *Green v. Connally*, 330 F.Supp. 1150, 1157 (D.D.C. 1971); 12 *The American and English Encyclopedia of Law* 306 (2d ed. 1899); Bogert & Bogert, *Law of Trusts* § 54 (5th ed. 1973) (in order to justify upholding trust as charitable, it must provide social benefits which will counterbalance the social disadvantages, such as freedom

from taxation); Restatement (Second) of Trusts § 368 comment b (1959). An obvious corollary, of course, is that the purpose of a charitable trust, educational or otherwise, may not be unlawful or against public policy. 4 Scott, *Law of Trusts* § 377 (3d ed. 1967); 2 Perry, *Trusts and Trustees* § 715 (2d ed. 1874); Restatement (Second) of Trusts § 377 comment c (1959). This Court acknowledged that principle a century ago: "A charitable use, *where neither law nor public policy forbids*, may be applied to almost any thing that tends to promote the well-doing and well-being of social man." *Ould v. Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1877) (emphasis added). See also *Perin v. Carey*, 24 How. 465, 501 (1861) ("public charitable uses" must be "consistent with local laws and public policy"); *Jackson v. Phillips*, *supra*, 96 Mass. at 556. In enacting an exemption for charitable organizations expressly based on their contribution to the public welfare, Congress could not have intended to repudiate the companion principle that organizations whose purposes violate fundamental national law and policy are not charitable in the legal sense.

C. Consistent Judicial and Administrative Construction of §§ 501(c)(3) and 170 Makes Clear That They Were Intended to Provide Tax Benefits Only to Organizations Charitable at Law

This understanding of the congressional intent underlying §§ 501(c)(3) and 170 is reflected in judicial decisions construing these provisions. In its first encounter with the predecessor of § 501(c)(3), this Court recognized that "the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924). Later, in *Helvering v. Bliss*, 293 U.S. 144 (1934), the Court stated that the purpose of the charitable deduction now found in § 170 was "to

encourage gifts to religious, educational and *other* charitable objects." *Id.* at 147 (emphasis added).[25]

Likewise, the lower courts have long looked to the common law of charitable trusts in determining the proper scope of §§ 501(c)(3) and 170. The courts have consistently held that these and related provisions were intended to apply to organizations recognized as "charitable" at common law. See, *e.g.*, *Pennsylvania Co. v. Helvering*, 66 F.2d 284, 285 (D.C. Cir. 1933); *St. Louis Union Trust Co. v. Burnet*, 59 F.2d 922, 926 (8th Cir. 1932); *Bok v. McCaughn*, 42 F.2d 616, 618-19 (3d Cir. 1930); *Peters v. Commissioner*, 21 T.C. 55, 59 (1953); *Sibley v. Commissioner*, 16 B.T.A. 915, 917-18 (1929); *Turnure v. Commissioner*, 9 B.T.A. 871, 873 (1927).[26] The cases have repeatedly emphasized the public benefit rationale underlying the exemption and have used this as a guide to its application. See, *e.g.*, *C.F. Mueller Co. v. Commissioner*, 190 F.2d 120, 122 (3d Cir. 1951); *Duffy v. Birmingham*,

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[25] While *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), involved the validity of a New York property tax exemption, the Chief Justice's explanation of the purposes underlying the state's exemption of organizations serving "religious, educational or charitable purposes," *id.* at 666-67, is equally applicable here:

> New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation . . . . The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption.

Id. at 672-73.

[26] The cases (including *Pennsylvania Co.*, *Bok*, *Turnure*, *Sibley* and *Peters* cited above) frequently rely upon this Court's broad common law definition of charitable purposes as set out in *Ould v. Washington Hospital for Foundlings*, *supra*, 95 U.S. at 311.

190 F.2d 738, 740 (8th Cir. 1951); *Harrison v. Barker Annuity Fund*, 90 F.2d 286, 288 (7th Cir. 1937). See also *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 432 (8th Cir. 1967) (Blackmun, J.). And, most important here, the lower courts have routinely applied the common law standards to organizations claiming "educational" or "religious" exemptions or deductions under §§ 501(c)(3) and 170 and related provisions. See, *e.g.*, *Girard Trust Co. v. Commissioner*, 122 F.2d 108, 109-10 (3d Cir. 1941); *United States v. Proprietors of Social Law Library*, 102 F.2d 481, 483 (1st Cir. 1939); *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930); *Hutterische Bruder Gemeinde*, 1 B.T.A. 1208, 1211 (1925); cf. *Underwriters' Laboratories, Inc. v. Commissioner*, 135 F.2d 371, 373-74 (7th Cir. 1943); *Hazen v. National Rifle Association*, 101 F.2d 432, 436 (D.C. Cir. 1938). Courts have expressly ruled that the "term 'charitable' [in the predecessor to § 501(c)(3)] is a generic term and includes literary, religious, scientific and educational institutions." *United States v. Proprietors of Social Law Library*, *supra*, 102 F.2d at 483; accord *Samuel Friedland Foundation v. United States*, 144 F. Supp. 74, 82 (D.N.J. 1956).

The IRS also has consistently taken the view that § 501(c)(3) was intended to enact an exemption for charitable organizations as they were known at common law. In 1924 the Solicitor of Internal Revenue, in a comprehensive opinion, concluded that "[t]here being no statutory definition of the word ['charitable'], it must be construed in accordance with its well understood common law meaning." Sol. Op. 159, III-1 C.B. 480, 481 (1924). The IRS has long recognized the tax-exempt status of many organizations in accordance with the common law concept of charity, *e.g.*, Sol. Op. 159, III-1 C.B. 480 (1924); S. 922, 1 C.B. 145 (1919); see Rev. Rul. 76-204, 1976-1 C.B. 152, and from the earliest days has relied on precedents involving comparable state tax exemption laws in

interpreting the scope of the Code provisions. S. 1176, 1 C.B. 147 (1919); A.R.R. 477, 4 C.B. 264 (1921); O.D. 510, 2 C.B. 209 (1920).[27]

Notably, the IRS has relied upon common law principles and precedents in a wide variety of situations to determine the applicability of § 501(c)(3) to "religious" or "educational" organizations. It has denied exempt status to "educational" organizations on the basis of the common law prohibition of political activity before that prohibition was incorporated into the statute. Treas. Reg. 45, Art. 517(1) (1921); *Slee v. Commissioner*, 15 B.T.A. 710, 715 (1929), *aff'd*, 42 F.2d 184 (2d Cir. 1930); S. 1362, 2 C.B. 152 (1920). See *Cammarano v. United States*, 358 U.S. 498, 512 (1959). The IRS has likewise denied exempt status to educational and other organizations because they served too limited a group of people and therefore did not provide sufficient public benefit to qualify under the common law test. See, *e.g.*, *Crellin v. Commissioner*, 46 B.T.A. 1152, 1155-56 (1942) (educational trust); *James Sprunt Benevolent Trust v. Commissioner*, 20 B.T.A. 19, 24-25 (1930) (educational and religious trust); A.R.R. 477, 4 C.B. 264, 265 (1921); S.M. 1836, III-1 C.B. 273

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[27] Petitioner Goldsboro argues that because charitable trusts were not covered by § 501(c)(3), the statute cannot be construed to exempt charitable organizations in the common law sense. G. Br. at 20. It cites Treas. Reg. 45, Art. 517 (1921), promulgated under the Revenue Act of 1918, and A.R.M. 104, 4 C.B. 262 (1921). These authorities simply reflect that the exemption as first enacted only applied to "corporations or associations" and was construed at that time not to apply to trusts. Congress acted quickly to extend exemption to any "community chest, fund, or foundation," Revenue Act of 1921, ch. 136, 42 Stat. 227, 253 (1921), the language still found in § 501(c)(3). Following the amendment, the courts have uniformly held that § 501(c)(3) and its predecessor provisions apply to charitable trusts. *E.g.*, *Fifth-Third Union Trust Co. v. Comm'r*, 56 F.2d 767 (6th Cir. 1932); *Bok v. McCaughn*, 42 F.2d 616 (3d Cir. 1930); *Morgan v. Nauts*, 6 AFTR 8011 (N.D. Ohio 1928); cf. G.C.M. 15778, XIV-2 C.B. 118 (1935).

(1924); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959) (organization must serve "a public rather than a private interest"). In 1967, the IRS relied on this principle to deny tax-exempt status and eligibility for charitable deductions to an organization that restricted the use of a recreational facility on the basis of race, ruling that racially restricted access violated the obligations of charitable organizations "in the generally accepted legal sense." Rev. Rul. 67-325, 1967-2 C.B. 113, 116.

This view of § 501(c)(3) is reflected in the IRS regulations adopted in 1959 which define "charitable" in its broad common law sense, as encompassing the other purposes specified in § 501(c)(3):

> The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Treas. Reg. § 1.501(c)(3)-1(d)(2). Contrary to the Government's suggestion, this regulation is consistent with the interpretation of the term "charitable" the IRS has followed, with minor deviations, since the earliest revenue acts.[28] It is plainly entitled to deference as a

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[28] Petitioners and the Government rely heavily on an unsigned 1923 ruling of the IRS' Income Tax Unit, I.T. 1800, II-2 C.B. 152,

valid and binding interpretation of § 501(c)(3). *Commissioner v. Portland Cement Co.*, 450 U.S. 156, 169 (1981); *United States v. Correll*, 389 U.S. 299, 305-07 (1967). As the Court unanimously held in *Commissioner v. Portland Cement Co.*, the Court "must defer to Treasury Regulations that 'implement the congressional mandate in some reasonable manner.'" 450 U.S. at 169 (quoting *Correll*, 389 U.S. at 307). Accord *National Muffler Dealers Association v. United States*, 440 U.S. 472, 476-77 (1979).[29]

The Code is the product of a continual process of revision and re-enactment. When Congress re-enacted the Code in 1954, it effectively incorporated the concept of tax exemptions for charitable organizations as developed

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which stated in *dicta* that "charitable" was used in the more restrictive sense of relief for the poor. This statement was effectively superseded the next year by a formal opinion of the Solicitor of Internal Revenue, expressly approved by the Commissioner, which concluded that Congress "intended that [the statute] should cover all such bequests as might properly be classified as charitable from the standpoint of the common law." Sol Op. 159, III-1 C.B. 480, 484 (1924). See also S.M. 1836, III-1 C.B. 273 (1924).

The Government and petitioners also rely upon a superseded regulation, initially issued under the 1924 Revenue Act, which provided that "Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor." U.S. Br. at 21-22; B.J. Br. at 15-16; G. Br. at 21-23. This regulation provides merely that a common example of organizations qualified under the word "charitable" in the statute were those for relief of the poor and does not purport to set forth a comprehensive definition. It is not inconsistent with the position adopted in the precedents discussed above that all exempt organizations, of whatever type, must be charitable in the legal sense. See *supra* at n.23.

[29] The Administration's change of position in these cases does not affect this conclusion in any way. Treas. Reg. § 1.501(c)(3)-1(d)(2) remains in effect, and the Administration has informed Congress that it will continue to support the IRS in applying this regulation. *1982 Hearing, supra* note 3, at 176 (testimony of Deputy Secretary of the Treasury McNamar).

in the consistent judicial and administrative interpretation outlined above. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). See also *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920). This presumption has particular force where the construction of the statute has been as consistent and long-standing as it is here. *United States v. Ryan*, 284 U.S. 167, 174-75 (1931).

If any doubt remained, Congress again adopted this construction of § 501(c)(3) in enacting the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969), a major overhaul of the Code provisions governing charitable organizations.[30] By 1969, the IRS regulation expressly adopting the common law concept of charitable organizations as the governing test under § 501(c)(3) had been in place for ten years. Indeed, the IRS had already ruled, in Rev. Rul. 67-325, 1967-2 C.B. 113, that a recreational organization practicing racial discrimination was not "charitable" and thus could not qualify for exemption under § 501(c)(3). See also Rev. Rul. 59-310, 1959-2 C.B. 146, 148 (applying legal definition of charity in granting exemption to organization operating community recreation facilities). In adopting the Tax Reform Act of 1969, Congress not only acquiesced in this interpretation, but also expressly recognized that for purposes of § 501(c)(3) all exempt organizations must serve "the specified charitable purposes," and that "charitable" is "a term that has been used in the law of trusts for hundreds of years." H.R. Rep. No. 413 (Part 1), 91st Cong., 1st Sess. 35, 43 (1969).

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[30] The Act substantially revised the tax law affecting many § 501(c)(3) organizations (see § 101, relating to private foundations) and imposed a number of limitations on charitable deductions (see § 201).

D. The Language of the Code Supports the Conclusion That Congress Intended That Exempt Organizations Must Satisfy the Standards of the Law of Charity

Petitioners' construction of the Code ultimately rests on the meaning they ascribe to Congress' use of the disjunctive. U.S. Br. at 13-18; B.J. Br. at 11-13; G. Br. at 15-17. They rely on canons of construction which "ordinarily suggest that terms connected by a disjunctive be given separate meanings, *unless the context dictates otherwise.*" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (emphasis added).[31] Here, the context dictates otherwise. The words "educational," "religious," and "charitable," of course, have variations in meaning, but the statutory and historical context makes clear that they were not intended to be entirely distinct. Rather, they share common characteristics and are descriptive of organizations that are charitable in the legal sense.

This meaning appears plainly on the face of § 170(c) where Congress used the term "charitable contributions" as a generic reference to contributions to "religious, charitable, or . . . educational" organizations. In using "charitable contributions" in this inclusive sense, § 170(c) demonstrates that Congress considers "educa-

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[31] In dissenting from denial of *certiorari* in *Prince Edward School Foundation v. United States*, 450 U.S. 944 (1981), Justice Rehnquist wrote that the separate references in § 501(c)(3) to "educational" and "charitable" organizations "[a]rguably . . . reflect Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." *Id.* at 947. This observation was based expressly on "a reading of the relevant provisions" in their "ordinary, everyday sense," *id.* at 947, 948, and apparently did not reflect consideration of the historic origins and legislative history of the provision or the judicial and administrative construction discussed above, or the evidence of congressional ratification set forth below. Moreover, as shown in the discussion which follows, on the face of the statute the construction of the IRS is also "arguable" and is at least as reasonable.

tional" organizations to be part of a broader class fairly described as "charitable." [32]

Given this context, the use of the word "or" in § 501(c)(3) simply cannot carry the heavy weight ascribed to it by petitioners and the Government. Certainly "or" does not always have one plain meaning.[33] Where appropriate, this Court has emphasized the ambiguity of the word "or" and refused to give it a disjunctive meaning. *De Sylva v. Ballentine*, 351 U.S. 570, 573-76 (1956); *Union Insurance Co. v. United States*, 6 Wall. 759, 764 (1867); *United States v. Fisk*, 3 Wall. 445, 447 (1865).

Thus, the Court has found that statutory terms separated by "or" can have overlapping meanings, or that one statutory term can be entirely encompassed by another.[34] The word "or" can also be used descriptively,

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[32] To the same effect, see the headings of § 501(h) ("Expenditures by Public Charities To Influence Legislation," referring to certain § 501(c)(3) organizations, including "educational institutions"); § 642(c) ("Deduction for Amounts . . . Set Aside for a Charitable Purpose," including "educational" purposes); § 2522 ("Charitable and Similar Gifts," referring to gifts to "religious, charitable, scientific, literary, or educational purposes"); and § 4911 (Chapter 41: "Public Charities," referring to § 501(h) organizations). It is well settled that the Court may look to the headings of the Code as an aid to statutory interpretation. *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941); *Knowlton v. Moore*, 178 U.S. 41, 65 (1900).

[33] See Chief Justice Marshall's classic dictum in *McCulloch v. Maryland*, 4 Wheat. 316, 414 (1819): "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea." See also *FBI v. Abramson*, 102 S. Ct. 2054, 2061 n.7 (1982).

[34] See, *e.g.*, *Hamling v. United States*, 418 U.S. 87, 112 (1974) ("obscene, lewd, lascivious, indecent, filthy or vile" construed to mean "obscene"); *Swearingen v. United States*, 161 U.S. 446, 450-51 (1896) ("obscene, lewd or lascivious" describe "one and the same offense," having "the same meaning as is given them at common law."). While the Court in *FCC v. Pacifica Foundation*, 438 U.S. 726, 741 (1978), gave an independent meaning to "indecent"

to illustrate the concept the legislature intends to express and thus to provide the general context in which the words must be construed.[35] It is reasonable to assume here that Congress included the terms "religious" and "educational" to this end. Certainly, iteration of examples is a useful way to explain the concept of charity, which, as this Court recognized in an early case, "is rather a matter of description than of definition." *Perin v. Carey*, 24 How. 465, 494 (1861). This usage also serves to confirm beyond doubt that these major categories of charitable institutions were eligible. See Reiling, *Federal Taxation, What Is a Charitable Organization?*, 44 A.B.A. J. 525, 527 (1958) (by use of the specific terms, Congress "made certain that the exemption extends to all organizations that are charitable within the legal meaning of that term"); *supra* at 21-22 & n.19.

This interpretation of the provision is squarely supported by the doctrine of statutory construction known as *noscitur a sociis*, a rule often used in interpreting lists of terms having a discernible common denominator. "A word usable in many contexts and with various shades of meaning . . . does not stand alone, but gathers meaning from the words around it." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (word "discovery" in phrase "exploration, discovery or prospecting" in the Code was limited to mining and did not include discovery

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in a similar phrase, as it applies to the broadcast media, it did so in reliance on long-standing administrative practice, congressional intent and policy considerations respecting the protection of children, further demonstrating that the meaning of the word "or" depends on the statutory context.

[35] See *Bowles v. Weiner*, 6 F.R.D. 540, 542 (E.D. Mich. 1947) ("or" used as a word of explanation showing relationship between similar terms); Black's Law Dictionary 987 (rev. 5th ed. 1979) ("or" may be used "to clarify what has already been said"). See also *United States v. Scrimgeour*, 636 F.2d 1019, 1024 (5th Cir.), *cert. denied*, 102 S.Ct. 359 (1981); *United States v. Moore*, 613 F.2d 1029, 1040-43 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

through scientific research).[36] This canon of construction "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* at 307. It has often been relied upon in construing provisions of the Code. Thus, in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), involving § 501(c)(6)—which allows a tax exemption for "business leagues, chambers of commerce, . . . or boards of trade"—the Court upheld the IRS' regulation defining "business league" as "an organization of the same general class as a chamber of commerce or board of trade." *Id.* at 482.[37]

Here, the word "educational" derives meaning as part of a statutory expression ("religious, charitable, or educational") which, in context, is an obvious reference to the major categories of charitable organizations recognized by the common law. Petitioners' brittle grammatical construction wholly disregards this context. But this

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[36] "[T]he coupling of words together shows that they are to be understood in the same sense." *Neal v. Clark*, 95 U.S. 704, 708-09 (1878) (holding "fraud" in phrase "fraud or embezzlement" to mean, like embezzlement, an intentional wrong and thus to exclude implied or constructive fraud). See also *Storti v. Commonwealth*, 178 Mass. 549, 553, 60 N.E. 210, 211 (1901) (Holmes, C.J.) ("unusual" in the phrase "cruel or unusual" in Massachusetts state constitution must be construed with the word "cruel" and cannot be taken so broadly as to prohibit every unusual punishment).

[37] The Court also confirmed the Commissioner's reasoning in denying tax-exempt status to an organization that conceivably was a business league but that "lacked the characteristics that a 'business league,' 'chamber of commerce,' and 'board of trade' *share in common and that form the basis for the exemption.*" 440 U.S. at 481 (emphasis added). See also *United States v. Leslie Salt Co.*, 350 U.S. 383, 393-94 & n.12 (1956) (meaning of "certificates of indebtedness" in Code provision taxing "bonds, debentures, or certificates of indebtedness" is limited to instruments similar to bonds or debentures); *Keystone Automobile Club v. Commissioner*, 181 F.2d 402, 405 (3d Cir. 1950) (federal tax exemption for clubs operated for "pleasure, recreation, and other nonprofitable purposes" limited to purposes similar to pleasure or recreation).

Court has emphasized that grammatical rules of statutory interpretation are to be used as a tool to ascertain congressional intent, not a straitjacket to compel disregard for the obvious purpose of the statute. See *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) ("in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law . . ") (quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857)). See also *Rose v. Lundy*, 102 S. Ct. 1198, 1203 (1982) (court "must analyze the policies underlying the statutory provision to determine its proper scope"); *Lynch v. Overholser*, 369 U.S. 705, 710 (1962); *Costanzo v. Tillinghast*, 287 U.S. 341, 344-45 (1932).

Petitioners and the Government also argue that it would not have been necessary for Congress to insert certain terms in § 501(c)(3) if it had intended the provision to encompass the legal con ept of charity. U.S. Br. at 20; B.J. Br. at 14; G. Br. at 19-20. But Congress' inclusion of these terms—e.g., "literary" or "scientific," or the prohibitions against private benefit and lobbying—merely confirm its intent to adhere to the common law model. The effect of the added terms is to codify corollaries of the legal concept of charity and in most instances they are declarative of conclusions previously adopted by administrative interpretation.[38] There is not

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[38] Thus, for example, in enacting amendments adding "scientific," Tariff Act of 1913, ch. 16, § (G)(a), 38 Stat. 114, 172; organizations "for the prevention of cruelty to animals," Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1057, 1076; and "literary," Revenue Act of 1921, ch. 136, § 231(6), 42 Stat. 227, 253, Congress simply clarified beyond dispute the application of § 501(c)(3) to organizations which were already qualified as common law charities. *E.g.*, Bogert & Bogert, *Trusts and Trustees* § 375, at 122, § 379 at 198 (rev. 2d ed. 1977); 4 Scott, *Law of Trusts* § 374.2 (3d ed. 1967). See 50 Cong. Rec. 1306 (1913); H.R. Rep. No. 1702, 57th Cong., 1st Sess. 2 (1902). Congress amended the predecessor of § 170 to allow a deduction for contributions to government bodies in 1921. Revenue Act of 1921, ch. 136, § 214(a)(11)(A), 42 Stat. 227, 241. But the

the slightest evidence of any congressional intent to alter the scope or fundamental purpose of the statute. See Reiling, *supra* at 525-26.

E. Petitioners Do Not Qualify for Favored Tax Treatment as Charitable Organizations

In its actions challenged in these cases, the IRS concluded that the development of a clear federal public policy condemning racial discrimination in education made it impossible to grant petitioners tax-exempt status under § 501(c)(3). Certainly, the strength of this national policy cannot be questioned. U.S. Br. at 11, 12. As set forth above, *supra* at 11-16, there is here not only a sharply defined constitutional and legislative policy proscribing government support for racially discriminatory private schools, but also a statutory prohibition of racial discrimination by the schools themselves. *Runyon v. McCrary*, 427 U.S. 160 (1976); 42 U.S.C. § 1981.[39]

IRS had already interpreted gifts for governmental purposes as "charitable," S. 992, 1 C.B. 145 (1919), and Congress noted that the law had "always been construed that way anyhow." *Hearings on H.R. 8245 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 54 (1921) (remarks of Senator Smoot). In 1934, Congress prohibited exempt institutions from propagandizing and lobbying, Revenue Act of 1934, ch. 277, § 106(6), 48 Stat. 680, 700, but Treasury and the courts already had implemented such prohibitions. See Treas. Reg. 45, Art. 517(1) (1921); *Slee v. Commissioner*, 15 B.T.A. 710, 715 (1929), *aff'd*, 42 F.2d 184 (2d Cir. 1930); *Herbert E. Fales*, 9 B.T.A. 828, 832 (1927); 4 Scott, *supra*, at § 374.6. The IRS described the 1934 legislation as approving "the long continued administrative construction" of the Code. G.C.M. 19715, 1938-1 C.B. 499, 500. See also *Massachusetts League v. United States*, 59 F. Supp. 346, 347 (D. Mass. 1945) (effect of amendment to social security tax exemption "was to give Congressional approval" to 1936 regulation containing the same prohibition).

[39] Section 1981 contains no exception for religiously-affiliated schools. In *Runyon*, the schools did not claim religious grounds for their discriminatory practices and the Free Exercise Clause of the First Amendment therefore was not involved. 427 U.S. at 167 & n.6. However, the Court expressly rejected an analogous argument based on the schools' alleged First Amendment right of association. *Id.* at

It is not seriously contested that both petitioners—described as "identical twins" by the Court of Appeals—maintain racially discriminatory admissions practices in contravention of this national policy. U.S. Br. at I; B.J. Br. at i; G. Br. at i. Goldsboro flatly excludes blacks from enrollment. G. Br. at 6; J.A. 9. Bob Jones also denied admission to blacks during the tax years in question. It denied admission to all blacks prior to 1971 and to all unmarried blacks from 1971 until 1975. J.A. A32-33.[40] Since 1975, Bob Jones has continued to deny admission to partners in an interracial marriage, to expel students who date outside their race or encourage others to do so, to bar students who are members of organizations which "advocate" interracial marriage and to enforce other racially discriminatory policies. J.A. A197, A208. These rules have had the effect of preserving Bob Jones as an overwhelmingly white institution.[41] Such rules prohibiting social contacts between the races are condemned by § 1981. *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980); *Faraca v. Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975); cf. *Loving v. Virginia*, 388 U.S. 1

175-76. See *Fiedler v. Marumsco Christian School*, 631 F.2d 1144, 1150-51 (4th Cir. 1980); *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). Petitioners' First Amendment contentions are discussed *infra* at 63-69.

[40] In *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), the court held that these discriminatory practices violated Title VI of the Civil Rights Act of 1964, and thus upheld the Veterans Administration's termination of Bob Jones' eligibility to participate in VA benefit programs.

[41] The University enrolled its first black in the fall of 1975 and at the time of trial had five blacks enrolled, of a total student body of about 5,000. J.A. A36, A73. Its policy now, as in the past, is unmistakably intended to maintain an essentially all-white Bob Jones University. Indeed, the school has expressed an interest in establishing a *separate* school "just exactly like this for blacks." J.A. A71-72; see also J.A. A111.

(1967); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). In short, Bob Jones' current policies are no less discriminatory than those of Goldsboro and equally provide the basis for denial of tax exemption.

Bob Jones argues that it is an "exclusively religious" organization, *e.g.*, B.J. Br. at 8, and thus that it is not subject to the IRS ruling denying exemption to educational organizations practicing racial discrimination. This argument is not supported by the record. Bob Jones is not a church or seminary engaged solely in religious activities. As the record plainly demonstrates, it is a school open to the public and providing accredited, secular instruction at all levels, from kindergarten through college and graduate schools. U.S. Br. at 2-3; J.A. A63.[42] While the district court stressed Bob Jones' religious functions, it also found that Bob Jones "serves educational purposes," 468 F. Supp. at 895, and the Court of Appeals properly relied on this finding in holding Bob Jones subject to IRS rulings applicable to all private schools. 639 F.2d at 150.

This case therefore does not present any question whether the Code compels denial of tax-exempt status for exclusively religious organizations which practice racial

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[42] Bob Jones' complaint admits it carries out "educational and religious activities", J.A. A43; its charter states its purpose "to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences." 468 F. Supp. at 893. See also J.A. A208. The IRS initially recognized Bob Jones' tax-exempt status on the ground that it was organized and operated "for educational purposes," and it was this exemption that Bob Jones sought to retain in *Bob Jones University v. Simon*. See No. 72-1470, Appendix at A13. See also *id.* at A18, A57. The overwhelming preponderance of its activity is the teaching of secular subjects—mathematics, science, history, literature, and business administration, among others. U.S. Br. at 2-3; J.A. A63, A127-28. Bob Jones describes itself as "no more a preachers' school or missionaries' school than it is a teachers' school, a business school, a music school, a speech school, or some other kind of school." J.A. A260.

discrimination. Section 501(c)(3) requires that an organization be operated "exclusively" for exempt purposes, and it is well established that a religious organization is not entitled to exempt status "if more than an insubstantial part of its activities" further non-exempt purposes. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959); see *Trinidad v. Sagrada Orden*, 263 U.S. 578, 583 (1924); *Scripture Press Foundation v. United States*, 285 F.2d 800 (Ct. Cl. 1961), *cert. denied*, 368 U.S. 985 (1962); *Christian Manner International, Inc. v. Commissioner*, 71 T.C. 661 (1979). Since Bob Jones' non-exempt secular educational activities can hardly be described as "insubstantial," denial of exemption on the basis of its racially discriminatory policies is entirely proper. See Rev. Rul. 75-231, 1975-1 C.B. 158.[43]

It is immaterial here that the 1894 Congress which first enacted the predecessor of § 501(c)(3) may not have regarded racially discriminatory practices as unlawful or against public policy; nor is it relevant that this Court, unfortunately for the country, expressed this view two years later. There is no reason to believe that Congress intended to freeze the internal revenue laws into promoting erroneous turn-of-the-century constitutional concepts, as reflected in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Hodges v. United States*, 203 U.S. 1 (1906). The concept of what is charitable in the legal sense obviously must reflect subsequent constitutional, statutory and judicial developments expressing the fundamental national policy against racial discrimination in education. See Bogert & Bogert, *Trusts and Trustees* § 369, at 66-67 (rev. 2d ed. 1977); 4 Scott, *Law of Trusts* § 368, at 2856, § 377, at 2972 (3d ed. 1967); Fisch, Freed & Schachter, *Charities and Charitable Foundations* § 256, at 229 (1974); Restatement (Second) of Trusts § 368 com-

[43] While no religious schools were before the court in *Green v. Connally*, 330 F. Supp. 1150, 1169 (D.D.C. 1971), the court made clear that its construction of § 501(c)(3) "applies to all private schools practicing racial discrimination," *id.* at 1164, including those claiming "divine inspiration for racial segregation." *Id.* at 1163.

ment b (1959). See also Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 Tax L. Rev. 477, 488-89 (1981). In any event, since Congress reenacted the Code in 1954 and revised the Code provisions governing charitable organizations in 1969, it is the intent of these more contemporary legislatures that is controlling here.

III. RECOGNITION OF TAX EXEMPTION FOR RACIALLY DISCRIMINATORY PRIVATE SCHOOLS WOULD DISREGARD THE JUDICIAL PRESUMPTION AGAINST ALLOWING TAX BENEFITS THAT SEVERELY FRUSTRATE SHARPLY DEFINED FEDERAL POLICY

The IRS ruling on racially discriminatory schools was independently required by the firmly established principle that Congress will not be presumed to intend federal tax benefits that would undermine clear governmental policies. *Commissioner v. Tellier*, 383 U.S. 687 (1966); *Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958); *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958); *Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326, 339 (1941). In *Tank Truck*, the Court upheld the Commissioner's disallowance of tax deductions for fines paid by a trucking company for violations of state maximum weight laws. As the Court unanimously held, allowance of a deduction cannot be permitted where this result "would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." 356 U.S. at 33-34. The "test," the Court continued, is the "severity and immediacy of the frustration" which would result from allowance of the tax benefit. *Id.* at 35. Accord *Commissioner v. Tellier*, *supra*, 383 U.S. at 694.

Adherence to this basic principle of statutory construction requires that racially discriminatory private schools be denied exemption under § 501(c)(3) and eligibility for deductible charitable contributions under § 170.

Green v. Connally, 330 F.Supp. 1150, 1161-64 (D.D.C. 1971). The constitutionally-based national policy against racial discrimination in education is manifestly more important than the State interest protected in *Tank Truck*. Further, the extension of tax-exempt status to racially discriminatory private schools would directly and severely undermine basic federal policy. Tax-exempt status and eligibility for charitable deductions would provide positive federal support for discriminatory private schools, thus promoting the development of schools whose admissions policies are unlawful under 42 U.S.C. § 1981 and whose practices would severely impair efforts to desegregate the public schools.

Contrary to the Government's suggestion, U.S. Br. at 25, *Tank Truck* was not simply an interpretation of the deduction for "ordinary and necessary" business expenses allowed under § 162 of the Code. Rather, the Court explicitly based its decision upon "the presumption against congressional intent to encourage violation of declared public policy," 356 U.S. at 35, a principle which plainly transcends the limited scope of § 162.[44] Accordingly, at the urging of the Government, the courts have held the *Tank Truck* principle applicable in a variety of situations unrelated to § 162. *Turnipseed v. Commissioner*, 27 T.C. 758 (1957) (denial of exemption under § 151 for alleged dependent married to another); *Mazzei v. Commissioner*, 61 T.C. 497 (1974) (denial of deduction under § 165 for loss incurred in attempted counterfeiting scheme); *Holt v. Commissioner*, 69 T.C. 75 (1977), *aff'd*, 611 F.2d 1160 (5th Cir. 1980) (denial of deduction under § 165 for value of marijuana seized by federal authorities).[45]

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[44] A companion case, *Hoover Motor Express Co. v. United States*, 356 U.S. 38 (1958), made crystal clear that the question of a tax benefit's possible frustration of public policy was entirely independent of the question of the "necessity" of the business expense under § 162. *Id.* at 39-40.

[45] Similarly, there is no basis for the Government's argument, U.S. Br. at 26, that Congress has eliminated the frustration of public pol-

As applied to §§ 501(c)(3) and 170, the *Tank Truck* rationale has particular force. There is no need for the Court here to rely on the presumed intent of Congress not to encourage violations of public policy because in enacting these provisions Congress adopted this very concept from the common law of charity. *Green v. Connally*, 330 F. Supp. at 1162. It would be an utter perversion of the public benefit rationale of §§ 501(c)(3) and 170 to hold that they apply to organizations whose practices undermine preeminent national policies.[46]

Petitioners argue that the *Tank Truck* doctrine sweeps too broadly and would permit the denial of tax-exempt status to institutions that discriminate on the basis of age or sex, or violate occupational health and safety laws, environmental laws, or even state zoning laws or building codes. B.J. Br. at 19-20. These concerns are

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icy doctrine by codifying the result of *Tank Truck* in the 1969 and 1971 amendments to § 162. While it may be arguable that Congress intended its amendments to § 162 to encompass fully the *Tank Truck* doctrine as it applies to that section, there is no reason to believe that Congress intended to preclude application of that principle to other sections of the Code. The Tax Court—again at the Government's urging—has specifically rejected this argument, *Mazzei v. Commissioner*, 61 T.C. 497 (1974), and the IRS has ruled that the grounds for disallowance of tax benefits on the basis of public policy outside the § 162 context "were not limited by Congress but remain the same as they were before 1969." Rev. Rul. 77-126, 1977-1 C.B. 48.

[46] It is hard to believe that the Government, despite its position in these cases, contends that there is no implied limitation on the scope of the "educational" exemption based upon an organization's illegal activities; otherwise, as Judge Leventhal put it, "Fagin's school for pickpockets would qualify . . . ." *Green v. Connally*, 330 F. Supp. at 1160. Since presumably the Government agrees that Fagin's school would not be entitled to exemption, see *1982 Hearing*, *supra* note 3, at 184, its position here is inexplicable in view of the illegality of racial discrimination practiced by private schools and the strength of the national policy against racial discrimination in education.

unfounded.[47] First, the constitutionally-based policy against racial discrimination in education surely occupies a unique place.[48] Moreover, *Tank Truck* is applicable here because petitioners deliberately and systematically engage in practices inconsistent with congressional policy, and these practices exert "a pervasive influence on the entire educational process." *Norwood v. Harrison*, 413 U.S. 455, 469 (1973). The doctrine presumably would not apply under §§ 501(c)(3) or 170 in the event of isolated violations of federal, state or local law. Finally, the *Tank Truck* test requires that the tax benefits result in a "severe" and "immediate" frustration of public policy. See 356 U.S. at 35. This test is plainly met in the present case by virtue of the direct conflict between these tax benefits and the constitutional policy proscribing government aid to segregated schools. It is hard to conceive of circum-

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[47] There are ample safeguards against IRS abuse in any event. Under a 1976 amendment to the Code, immediate judicial review is now available to test IRS actions under §§ 501(c)(3) and 170. 26 U.S.C. § 7428. Ultimately, of course, Congress exercises close oversight of IRS policies and can correct any perceived errors in application of the *Tank Truck* presumption. See *Bob Jones University v. Simon*, 416 U.S. 725, 749-50 (1974); *infra* at 55-56.

[48] The Thirteenth Amendment was intended to facilitate the abolition of "all badges and incidents of slavery in the United States." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). And "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969). There is, of course, no constitutional amendment specifically barring sex discrimination, and while a strict standard applies, see *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331, 3336 (1982); *id.* at 3344 (Powell, J., dissenting), the Court has held that sex, unlike race, is not *per se* an invidious classification. See, *e.g.*, *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Reed v. Reed*, 404 U.S. 71 (1971). Nor does 42 U.S.C. § 1981 prohibit private discrimination in education on the basis of sex. In enacting Title IX of the Education Act Amendments of 1972, Congress expressly exempted educational institutions which have traditionally had a policy of admitting only students of one sex. 20 U.S.C. § 1681(a)(5).

stances arising out of the examples posed by petitioners under which the allowance of tax exemptions would have a comparable impact on governmental objectives.

IV. SINCE 1970 CONGRESS HAS EXPLICITLY RATIFIED AND APPROVED THE IRS ACTIONS CHALLENGED BY PETITIONERS

If any doubt existed in 1970 as to the validity of the IRS position, it has been entirely dispelled by subsequent congressional actions. Congress has been aware of the IRS decision on this highly visible issue since the day it was announced,[49] and has ratified it by repeated acts of approval. The Senate Select Committee on Equal Education Opportunity held hearings on the IRS decision a month later, and Commissioner Thrower testified at length. *1970 Hearings, supra* note 7, at 1992-2028.[50] At the conclusion of its hearings in 1972, the Select Committee unanimously endorsed the position adopted by the IRS, "recommend[ing] that firm steps be taken to enforce" the policy and noting that the Court's affirmance in *Green* "firmly establishes the legal standard." *Senate Select Comm. on Equal Educational Opportunity, 92d Cong., 2d Sess., Toward Equal Educational Opportunity* 269 (Comm. Print 1972).

Since then, Congress has repeatedly refused to alter the IRS position. At least eleven bills to overturn the IRS construction of § 501(c)(3) have been introduced; none has been reported out of committee.[51] In 1976, Congress

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[49] See 116 Cong. Rec. 24,120-22 (July 14, 1970) and 24,427-33 (July 15, 1970) (remarks of Sen. Allen); 116 Cong. Rec. 24,836, 24,906-07 (July 17, 1970) (remarks of Sen. Thurmond).

[50] See also *Tax Exemptions for Charitable Organizations Affecting Poverty Programs: Hearings Before the Subcomm. on Employment, Manpower and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 77-79 (1970).

[51] See H.R. 802, 97th Cong., 1st Sess. (1981); H.R. 332, 97th Cong., 1st Sess. (1981); H.R. 95, 97th Cong., 1st Sess. (1981);

amended § 501(c)(3) to add an express reference to amateur sports organizations, Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730 (1976), but took no action to modify the Commissioner's interpretation of the statute with respect to racially discriminatory private schools.[52] Similarly, the Tax Reform Act of 1976 expressly overturned this Court's decision in *Bob Jones University v. Simon* by permitting declaratory judgment actions to test the denial or withdrawal of tax-exempt status, Pub. L. No. 94-455, § 1306(a), 90 Stat. 1520, 1717, codified at 26 U.S.C. § 7428; see H.R. Rep. No. 658, 94th Cong., 1st Sess. 283-84 (1975), but Congress did nothing to affect the IRS interpretation of § 501(c)(3) at issue in the same case.

This consistent pattern of congressional refusal to alter or amend § 501(c)(3) in the face of the IRS' well-known ruling would in itself be sufficient to demonstrate congressional ratification:

S. 995, 96th Cong., 1st Sess. (1979); H.R. 1905, 96th Cong., 1st Sess. (1979); H.R. 96, 96th Cong., 1st Sess. (1979); H.R. 3225, 94th Cong., 1st Sess. (1975); H.R. 1394, 93d Cong., 1st Sess. (1973); H.R. 5350, 92d Cong., 1st Sess. (1971); H.R. 2352, 92d Cong., 1st Sess. (1971); H.R. 68, 92d Cong., 1st Sess. (1971).

[52] Congress has amended § 501 of the Code in various respects at least fourteen times since 1970. Pub. L. No. 97-119, § 103(c)(1), 95 Stat. 1635, 1638 (1981); Pub. L. No. 96-605, § 106(a), 94 Stat. 3521, 3523 (1980); Pub. L. No. 96-601, § 3(a), 94 Stat. 3495, 3496 (1980); Pub. L. No. 96-364, § 209(a), 94 Stat. 1208, 1290 (1980); Pub. L. No. 96-222, § 108(b)(2)(B), 94 Stat. 194, 226 (1980); Pub. L. No. 95-600, § 703(b)(2), 92 Stat. 2763, 2939 (1978); Pub. L. No. 95-345, § 1(a), 92 Stat. 481, 481 (1978); Pub. L. No. 95-227, § 4(a), 92 Stat. 11, 15 (1978); Pub. L. No. 94-568, §§ 1(a), 2(a), 90 Stat. 2697, 2697 (1976); Pub. L. No. 94-455, §§ 1307(a)(1) & (d)(i), 1312, 1313(a), 90 Stat. 1520, 1720-21, 1727, 1730 (1976); Pub. L. No. 93-625, § 10(c), 88 Stat. 2108, 2119 (1975); Pub. L. No. 93-310, § 3(a), 88 Stat. 235, 235 (1974); Pub. L. No. 92-418, § 1(a), 86 Stat. 656, 656 (1972); Pub. L. No. 91-618, § 1, 84 Stat. 1855, 1855 (1970).

> [O]nce an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979). Accord *Haig v. Agee*, 453 U.S. 280, 300-01 (1981).

But this case presents an even more compelling demonstration of Congress' endorsement of the agency's statutory construction. In 1976, Congress expressed its approval affirmatively by enacting what is now § 501(i), Act of October 20, 1976, Pub. L. No. 94-568, 90 Stat. 2697 (1976), which denies tax-exempt status to any social club, otherwise qualifying for exemption under § 501(c)(7), if its charter or any written policy statement provides for "discrimination against any person on the basis of race, color, or religion." The legislative history of § 501(i) makes clear that the statute was passed as a direct result of congressional dissatisfaction with the decision of the three-judge district court in *McGlotten v. Connally*, 338 F. Supp. 448, 457-59, 462 (D.D.C. 1972), insofar as it held that recognition of tax-exempt status for segregated social clubs did not violate the Code. Both the House and Senate committee reports state that permitting tax exemptions for such segregated private clubs is inconsistent with "national policy", S. Rep. No. 1318, 94th Cong., 2d Sess. 8 (1976), and specifically refer to the Court's affirmance of *Green v. Connally* as establishing that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status." *Id.* at 7-8 & n.5; H.R. Rep. No. 1353, 94th Cong., 2d Sess. 8 & n.5 (1976).[53]

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[53] In 1980 Congress amended § 501(i) to except from its ban on religious discrimination "a club which in good faith limits its

Congress thus approved the IRS interpretation of § 501(c)(3) with positive legislation. It obviously was not necessary for Congress to enact new legislation to deny racially discriminatory schools tax-exempt status since Congress knew *Green* had held that the existing statute barred exempt status for such schools. Instead, Congress went one step *further* and enacted legislation to *extend* the policy of Rev. Rul. 71-447 to private social clubs—despite the traditionally greater protection for privacy interests in social clubs than in "private" schools, which are commonly "advertised and offered to members of the general public." *Runyon v. McCrary*, 427 U.S. 160, 172 (1976). Petitioners and the Government offer no explanation, and none can be imagined, why Congress would have forbidden racial discrimination by exempt social clubs—including school-related organizations like fraternities—yet sanctioned the exclusion of blacks by tax-exempt schools themselves.[54]

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membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude individuals of a particular race or color." The amendment provides further support for Congress' commitment to deny tax-exempt status to organizations, including religious organizations, that discriminate on racial grounds. Congress intended to exempt organizations like the Knights of Columbus, which "never supported, promoted or accepted any form of racial discrimination in its membership practices." *Miscellaneous Tax Bills V: Hearings Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 96th Cong., 2d Sess. 332 (1980). Congress left unchanged the statutory prohibitions against discrimination based on "race" or "color," and the Senate committee report made clear that the change in the religious prohibition was "not intended to authorize discrimination on the basis of race under the guise of religious affiliation." S. Rep. No. 1033, 96th Cong., 2d Sess. 10 (1980).

[54] Petitioners and the Government attempt to minimize the significance of § 501(i) by arguing that the committee reports' reference to *Green* should not be read as approval, and that the committee reports, in any event, are entitled to little weight. These arguments miss the point entirely. The significance of § 501(i) lies less in what the committee reports say than in the *action* Congress took, passing legislation that cannot be explained in any way other than

Congress' enactment of the Dornan and Ashbrook Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559 (1979), rather than detracting from the force of this argument, in fact bolsters it. The Dornan Amendment, *id.* § 615, 93 Stat. at 577, prohibited the funding of revenue procedures proposed by the IRS in 1978 and 1979, 43 Fed. Reg. 37,296 (1978); 44 Fed. Reg. 9451 (1979), which would have imposed new procedures to verify whether the actual practices of private schools conformed to their announced policy of nondiscrimination. The Ashbrook Amendment prohibited the use of the appropriated funds for any other "procedures, guidelines . . . or measure which would cause the loss of tax-exempt status to private, religious, or church-oriented schools . . . *unless in effect prior to August 22, 1978.*" Section 103 of the Act, 93 Stat. at 562 (emphasis added).

Both the Ashbrook and Dornan Amendments thus were prospective in effect and did not in any way affect the status of Rev. Ruls. 71-447 and 75-231. As petitioner Goldsboro acknowledges, G. Br. at 28 n.13, these amendments were expressly intended to "maintain the status quo"; and hence, despite extensive consideration of the question, Congress once again deliberately chose to leave the Commissioner's authority under these rulings untouched.

The legislative history of the Dornan and Ashbrook Amendments makes clear that what troubled Congress

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as congressional approval of the policy adopted by the IRS in Rev. Rul. 71-447. Moreover, the Government is simply wrong in contending that the committee reports are not entitled to significant weight in evaluating the legislative history of § 501(i). U.S. Br. at 32-33 & n.30. See, *e.g.*, *Commissioner v. Bilder*, 369 U.S. 499, 502-04 (1962); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 519 & n.15 (1981). The case relied upon by the Government is inapt because it concerned a statement in a committee report "as to what the Committee believes an *earlier* statute means . . . ," *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (emphasis added), whereas the reports here explain the intent of Congress regarding § 501(i), a contemporaneous enactment.

was the "affirmative action" or "quota" aspect of the new IRS proposals.[55] But nothing in the Ashbrook or Dornan Amendments calls into question the continuing congressional support for IRS rulings prohibiting tax exemption where racial discrimination is admitted or clear. On the contrary, Congressman Dornan stated in presenting his amendment: "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50." 125 Cong. Rec. H5982 (daily ed. July 16, 1979). Congressman Ashbrook similarly explained: "My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched." 125 Cong. Rec. H5882 (daily ed. July 13, 1979).[56] Likewise, when Senator Helms introduced the Ashbrook Amendment in the Senate, he stated: "My amendment today does not change the existing law contained in Reve-

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[55] See 125 Cong. Rec. H5879 (daily ed. July 13, 1979) (statement of Rep. Ashbrook); 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (statement of Rep. Dornan). See also *Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 336 (statement of Rep. J. Anderson), 1261 (statement of Rep. J. Edwards), 1303 (statement of Rep. Satterfield) (1979); *Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 21 (statement of Sen. Dole), 23-24 (statement of Sen. Jepsen), 70 (statement of Sen. Warner) (1979); *1982 Hearing, supra* note 3, at 103-04.

[56] During consideration of re-enactment of the Ashbrook Amendment in 1981, Congressman Ashbrook re-emphasized:

> [The 1981 Amendment contains] the same language in the amendment of 2 years ago, the same cut off date. I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1978.

127 Cong. Rec. H5395 (daily ed. July 30, 1981).

nue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis." 125 Cong. Rec. S11,979-80 (daily ed. Sept. 6, 1979).[57] Indeed, the legislative history of the Ashbrook and Dornan Amendments reflects overwhelming congressional support, across a remarkably broad spectrum, for the IRS' continuing authority to deny tax exemption to schools engaged in racial discrimination.[58]

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[57] In light of these explicit statements on the scope of the amendments, the individual views of Congressman Ashbrook and Senator Helms, relied upon by the Government, U.S. Br. at 28-29 & n.25, are entitled to no weight. The statements quoted above represented the understanding of the amendments upon which congressional action was based.

[58] See, *e.g.*, *Tax Exempt Status of Private Schools, House Hearings, supra* note 55, at 1261 (remarks of Rep. J. Edwards: "The Congress did not intend for the IRS to set guidelines for affirmative action in private schools, although it does allow the tax-exempt status to be withdrawn where there is evidence that a school does not have an open-door policy"); at 1262 (remarks of Rep. D. Evans: "the IRS already has the authority to take action where there is clear evidence that racial discrimination is practiced"); *Tax Exempt Status of Private Schools, Senate Hearings, supra* note 55, at 20 (remarks of Sen. Dole: "racial discrimination in any form is abhorrent and contravenes the public policy repeatedly reaffirmed by Congress in numerous civil rights measures. The courts have clearly held that a private school which engages in intentional racial discrimination in its student admissions policies is not entitled to Federal tax-exempt status"); 125 Cong. Rec. H5982 (daily ed. July 16, 1979) (remarks of Rep. C. Miller: "No one is saying that we should allow tax breaks for segregated schools, but IRS already has significant authority to act, and indeed, has done so in the past, where evidence of discrimination exists"); 125 Cong. Rec. H5884 (daily ed. July 13, 1979) (remarks of Rep. Grassley: "Nobody argues that racial discrimination should receive preferred tax status in the United States").

See also *Tax Exempt Status of Private Schools, House Hearings, supra*, at 586-87 (statement of Sen. Thurmond: "The object of the proposed procedure is to revoke the tax exemption status of private schools actively practicing racial discrimination. It is impossible for a reasonable man to argue against that purpose, and I wish to make it clear that it is not the purpose to which I am objecting").

This legislative history conclusively demonstrates that Congress has ratified and approved the construction placed on § 501(c)(3) by the IRS, the three-judge court in *Green* and this Court. The Court has repeatedly held that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction." *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981); accord *Haig v. Agee*, 453 U.S. 280, 291 (1981). This principle has particular force where "an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *CBS, Inc. v. FCC*, 453 U.S. at 382. See also *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *Monell v. Department of Social Services*, 436 U.S. 658, 719 (1978) (Rehnquist, J., dissenting: "This is not some esoteric branch of the law in which congressional silence might reasonably be equated with congressional indifference."). Moreover, here "Congress has not just kept its silence by refusing to overturn the administrative construction but has ratified it with positive legislation." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 (1969).

These considerations have even greater significance in the tax area, where congressional oversight committees exercise traditional year-by-year supervision and revision of the statutory scheme. See *United States v. Correll*, 389 U.S. 299, 305-07 (1967); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938); Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 Harv. L. Rev. 377, 379 (1941). This close congressional oversight provides assurance that Congress has in fact confronted the issue and made a conscious decision to leave the Commissioner's interpretation of the Code in place.

These factors also strongly suggest that there is no basis for the Court to reconsider its affirmance in *Coit v. Green*, 404 U.S. 997 (1971).[59] "[C]onsiderations of *stare decisis* weigh heavily in the areas of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Accord *Patsy v. Board of Regents*, 102 S. Ct. 2557 (1982); see *id.* at 2569 (White, J., concurring: "[I]n a statutory case, a particularly strong showing is required that we have misread the relevant statute and its history.") See also *Runyon v. McCrary*, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring). This rule is especially appropriate in the tax field where there is intensive congressional oversight of judicial decisions. See *United States v. Byrum*, 408 U.S. 125, 135 (1972); *Chapman v. Commissioner*, 618 F.2d 856, 869 (1st Cir. 1980), *cert. dismissed*, 451 U.S. 1012 (1981). Congress surely has shown no reluctance to overrule the courts in this area, as it did with respect to the

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[59] There is no question that an affirmance without opinion is a decision with "precedential value." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Court's statement in *Bob Jones University v. Simon*, 416 U.S. 725, 740 n.11 (1974), that the affirmance in *Green* is entitled to lesser precedential weight because it was not "a truly adversary controversy" may have derived from an inaccurate description of *Green* in the Bob Jones University brief in *Simon*. No. 72-1470, Brief for Petitioner at 22. Although the Government announced its change of position following issuance of the order for preliminary injunction, the intervenors in *Green* continued to dispute the authority of the IRS to deny tax-exempt status, both in the three-judge court and before this Court, addressing substantially the same issues as raised herein. See *1982 Hearing*, *supra* note 3, at 275-353; Amicus Brief of the Lawyers' Committee for Civil Rights under Law at 4-7 n.3. This Court's action thus can only be construed as a decision on the merits. Indeed, shortly thereafter, the Court in *Norwood v. Harrison*, 413 U.S. 455, 463 & n.6 (1973), relied on the affirmance in *Green* in support of its holding that state aid to discriminatory private schools is unconstitutional.

Court's decision in *Bob Jones University v. Simon* and the three-judge court's decision in *McGlotten v. Connally*.

V. THE FIFTH AMENDMENT BARS GRANTING THE TAX BENEFITS OF §§ 501(c)(3) AND 170 TO SCHOOLS THAT DISCRIMINATE ON THE BASIS OF RACE

Under this Court's unanimous decision in *Norwood v. Harrison*, 413 U.S. 455 (1973), it would be unconstitutional to afford racially discriminatory schools tax-preferred status under §§ 501(c)(3) and 170 because those special tax benefits constitute significant government aid beyond the limited scope of permissible "generalized services," such as utilities and fire protection.[60] *Id.* at 465; see *Gilmore v. City of Montgomery*, 417 U.S. 556, 568 (1974). In *Norwood*, the Court held that a state program providing free textbooks to all school children in the state was unconstitutional to the extent that it provided books to children attending racially discriminatory schools. The program had been in effect long before the *Brown* decision, and the statute was not intended to further racial segregation. 413 U.S. at 460. Thus, the state argued, as does the Government in these cases, that the statute could not violate the Equal Protection Clause because there was no discriminatory purpose in its enactment or operation. *Id.* at 460; U.S. Br. at 39. The Chief

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[60] It is not necessary to reach this constitutional issue because petitioners clearly do not qualify as tax-exempt institutions under the statute. This Court normally "will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27 (1980); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). The constitutional issue presented in these cases, however, has already been decided in *Norwood v. Harrison*, and, given current uncertainties regarding implementation of § 501(c)(3), see U.S. Br., Sept. 9, 1981 at 16-17, it would be entirely appropriate to base petitioners' ineligibility for special tax benefits on this solid constitutional ground.

Justice, writing for the Court, unequivocally rejected that argument because of the Government's constitutional duty to "steer clear" of aid to discriminatory schools:

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty.

413 U.S. at 466; see also *Gilmore v. City of Montgomery*, 417 U.S. at 566-67.

There is no basis whatsoever for the Government's suggestion that this Court tacitly overruled the unanimous *Norwood* decision in *Washington v. Davis*, 426 U.S. 229, 239-44 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). U.S. Br. at 39 & n.36. None of the opinions in *Davis* or *Feeney* even mentioned *Norwood*, because both cases addressed a completely different issue. Those cases considered statutes which in operation allegedly had disparate impacts upon blacks and women, respectively, and the issue in each was whether this disproportionate impact alone made the statute unconstitutionally discriminatory. Neither case involved express discrimination of any kind, let alone racial discrimination in schools, or government aid to schools admittedly engaged in such discrimination. Thus "one immediate and crucial difference" between these cases and the cases cited by the Government is that here the existence of racial discrimination is clear; the only issue is whether these tax benefits impermissibly aid the discriminatory institutions. *Washington v. Seattle School District No. 1*, 102 S. Ct. 3187, 3203-04 (1982); cf. *Rogers v. Herman Lodge*, 102 S. Ct. 3272, 3289-93 (1982) (Stevens, J., dissenting).

There can be no question that tax benefits under §§ 170 and 501(c)(3) provide significant financial aid

to private schools.[61] See *Bob Jones University v. Simon*, 416 U.S. 725, 729-30 (1974). The § 501(c)(3) exemption permits the institution to divert funds from the federal treasury to petitioners' own practices, in amounts that far exceed the limited financial aid provided by the Mississippi textbook program at issue in *Norwood*.[62] *Bob Jones*, 639 F.2d at 152 n.7; see *Walz v. Tax Commission*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring: "exemptions do not differ from subsidies as an economic matter"); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 793 (1973). The § 170 deduction provides even greater financial aid, as an essential inducement for the private financial support upon which petitioners rely. The benefits provided by § 170 are "in the nature of a matching grant" by the government for each private contribution, *Green v. Connally*, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), and are neither functionally nor legally distinguishable from cash grants.

Neither the Government nor petitioners contest the importance of tax-exempt status to a private school; they contend, however, on the basis of *Walz v. Tax Commission*, 397 U.S. 664 (1970), that tax benefits cannot constitute "significant" aid. But *Norwood* considered and

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[61] As the Solicitor General wrote in the Government's Brief in *Bob Jones University v. Simon*: "[R]ecognition by the Internal Revenue Service of Bob Jones University's tax-exempt status and the right to receive tax-deductible contributions, serves to 'facilitate, reinforce, and support' its racially discriminatory admissions policy within the meaning of *Norwood*." No. 72-1470, Brief for Respondents at 32.

[62] The amount of aid in *Norwood* ranged from $170 per year for the smallest school to $25,000 for the largest, and averaged less than $4,000 per school. No. 72-77, Appendix at 31-37. The total amount of annual textbook aid for 114 schools in Mississippi, $452,000, *id.* at 36, was less than the $490,000 in tax benefits that would accrue to Bob Jones under § 501(c)(3) should it prevail.

rejected that argument as well. The state argued in *Norwood* that textbooks were "neutral" aid of a type already found to be permissible for Establishment Clause purposes in *Board of Education v. Allen*, 392 U.S. 236 (1968). But this Court held the Establishment Clause analogy inapplicable to cases involving aid to racially discriminatory schools. *Walz* merely indicated that, in charting a course between the Free Exercise Clause on the one hand and the Establishment Clause on the other, the Government may maintain an attitude of "benevolent neutrality" toward religious institutions and may provide neutral benefits like the tax exemptions that have been granted to churches in this country for 200 years. 397 U.S. at 669, 676-77. In contrast, the Government has a duty to avoid even such neutral aid to schools which discriminate on the basis of race:

> However narrow may be the channel of permissible state aid to sectarian schools, *Nyquist*, *supra*; *Levitt* [*v. Committee for Public Education*, 413 U.S. 472 (1973)], it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices . . . .

Norwood v. Harrison, 413 U.S. at 470.[63] *Norwood's* citation to *Nyquist* in this passage is of particular significance. *Nyquist*, which was decided the same day as *Norwood*, held that a program providing tax benefits to parents of

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[63] See also 413 U.S. at 464 n.7; *Committee for Public Educ. v. Nyquist*, 413 U.S. at 802 n.5 (Burger, C.J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 671 n.2 (1971) (White, J., concurring in part and dissenting in part); compare *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (a state subsidy to sectarian school parents for the costs of bus fares did not violate the Establishment Clause), with *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (a state subsidy to children attending segregated private schools violates equal protection).

children attending private sectarian schools violated the Establishment Clause. *Norwood* cites *Nyquist* to illustrate that even indirect aid in the form of tax benefits may constitute significant aid for Establishment Clause purposes. *Norwood* then emphasizes that the doctrine of equal protection permits even less aid to discriminatory private schools. That analysis compels the conclusion that petitioners cannot be afforded the benefits of §§ 170 and 501.[64]

Rather than seriously contest this analysis, the Government merely observes that "[c]ommentators have suggested" that treating tax benefits as government aid for constitutional purposes may have far-reaching consequences. U.S. Br. at 39-40 n.37. *Nyquist*, of course, articulated that principle some years ago without dire results; in any event, there is here no need for a ruling that reaches beyond the ineligibility of racially discriminatory private schools for special tax benefits "in the

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[64] In fact, in the course of rejecting the argument that textbooks are different from tuition grants, *Norwood* equates the very tax benefits here at issue with other forms of impermissible aid:

> This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools.[6] A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases.

413 U.S. at 463. Among those "prior cases" cited in note 6 as "not legally distinguishable" from *Norwood* is the Court's affirmance of *Green v. Connally*. Because *Green* held that racially discriminatory schools are not entitled to the tax benefits of §§ 170(c)(2) and 501(c)(3), that citation to *Green* necessarily means that such benefits, like textbooks and tuition grants, are an impermissible form of financial assistance to discriminatory schools. 413 U.S. at 463-65; see also *Nyquist*, 413 U.S. at 802 n.5 (Burger, C.J., concurring); *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970).

nature of matching grants." [65] The § 501(c)(3) exemption provides assistance to entities whose activities have been determined by Congress to advance the public interest. Inclusion in that group therefore carries with it the stamp of government approval, see *Green v. Kennedy*, 309 F. Supp. at 1135, at least in the sense that the organization is deemed entitled to this measure of official support as a participant in the diversified philanthropic sector that strengthens "the pluralism of our social order." *House Comm. on Ways and Means, 89th Cong., 1st Sess., Treasury Department Report on Private Foundations* 13 (Comm. Print 1965). That imprimatur distinguishes charitable exemptions and deductions from, for example, business expense deductions, which relate merely to neutral measurement of income, and other tax benefits whose availability does not imply that the taxpayer measures up to a public interest standard of any sort.

Racial discrimination, of course, has "no value" under our national charter and laws, see *Norwood*, 413 U.S. at 469-70, and the bar of official support for racial discrimination is most crucial in the field of education. Whether other forms of discrimination or other deductions or exemptions will require the same constitutional conclusion cannot be determined in the abstract: "only by sifting facts and weighing circumstances on a case-by-case basis" is it possible to determine whether government has become impermissibly involved in private discrimination. *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974).

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[65] Even the one commentator cited by the Government distinguished provision of such benefits to racially discriminatory schools from other charitable exemptions. See Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L.J. 51, 76-78 (1972); see also *Wright v. Regan*, 656 F.2d 820, 834 n.41 (D.C. Cir. 1981), *petitions for cert. filed*, 50 U.S.L.W. 3353 (Oct. 20, 1981) (No. 81-757), 3467 (Nov. 23, 1981) (No. 81-970).

VI. THE FIRST AMENDMENT DOES NOT REQUIRE THAT RACIALLY DISCRIMINATORY RELIGIOUS SCHOOLS BE AFFORDED THE TAX BENEFITS OF §§ 501(c)(3) AND 170

As the foregoing discussion demonstrates, private schools which practice racial discrimination do not qualify for tax benefits under §§ 501(c)(3) and 170. That rule applies generally to all private schools providing secular instruction regardless of the justification advanced for the racially discriminatory practices. Petitioners contend that as applied to them the statute violates the Free Exercise and Establishment Clauses of the First Amendment. The Fourth Circuit and the Government correctly reject that argument.

In support of their free exercise claim, petitioners must of course demonstrate that this construction of the statute impinges upon their religious practices. But even if the statute does impose some burden, it is necessary to determine whether that burden is outweighed by the government interest served by the statute and whether accommodating the religious practice would unduly interfere with fulfillment of the governmental interest. *United States v. Lee*, 102 S. Ct. 1051, 1055 (1982). Petitioners contend that denial of tax-exempt status forces them to choose between operating their educational institutions on a racially discriminatory basis without the benefit of the charitable exemption or giving up their discriminatory practices in order to qualify. The Court of Appeals assumed for purposes of its decision that that choice did impose some burden upon petitioners but correctly found that indirect economic burden to be outweighed by the compelling government interest.

Section 501(c)(3) does not restrict or prohibit petitioners' right to hold or teach their religious beliefs nor does it restrict any religious practice. See *Braunfeld v. Brown*, 366 U.S. 599, 603-05 (1961).[66] Further, the stat-

[66] Petitioner Goldsboro refers to *Braunfeld* as involving regulations that had only an "incidental effect" on the practice of religion. G. Br. at 38. Yet, the free exercise claim in *Braunfeld* was that

ute leaves the schools entirely free to continue their racially discriminatory policies; they simply will not receive the benefit of a tax exemption if they do so. Such regulation is "wholly different than when the legislation attempts to make a religious practice itself unlawful." *Id.* at 606.[67]

United States v. Lee recently applied these principles to uphold imposition of social security taxes upon a member of the Old Amish Order whose faith forbids paying such taxes or receiving social security benefits. The Court noted that the diverse and cosmopolitan nature of our society makes it particularly difficult to accommodate all religious beliefs in the area of taxation, 102 S. Ct. at 1056, that the line Congress had drawn in recognizing only limited religious exemptions from the tax was permissible, and that the government interest in the mandatory social security system outweighed Lee's free exercise rights. *Id.* at 1056-57. See *Braunfeld v. Brown*, 366 U.S. at 606; *Winters v. Commissioner*, 468 F.2d 778, 781 (2d Cir. 1972) (denial of § 170 deduction for contribution to religious school does not violate First

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Sunday closing "will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment . . . ." 366 U.S. at 601. Petitioners, on the other hand, have continued their operations without the contested tax exemption for more than a decade. If the *Braunfeld* burden was "incidental" and "therefore did not unconstitutionally burden the practice of religion," G. Br. at 38, *a fortiori*, the burden here at issue is permissible.

[67] This statute at most imposes only an indirect and insignificant burden upon religious practice, but Congress may actually prohibit such practices when they are contrary to important public policies. 366 U.S. at 605. For example, in addition to *United States v. Lee*, discussed in the text, *Gillette v. United States*, 401 U.S. 437 (1971) (Military Selective Service Act), *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor) and *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy), all upheld laws which punished as crimes acts required by religious belief. Cf. 42 U.S.C. § 1981. See Rev. Rul. 75-231, 1975-1 C.B. 158 (First Amendment "does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious").

Amendment). See also *Johnson v. Robison*, 415 U.S. 361, 385 (1974).

Petitioners simply ignore these principles and cite *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Those cases are inapposite. They merely demonstrate that the government cannot impose a severe and direct burden upon religion where accommodation of the free exercise rights would not interfere with fulfillment of the governmental interest. In *Wisconsin v. Yoder*, a compulsory school attendance law compelled the Amish, "under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. But the Court found that the proscribed Amish practice of providing vocational training in lieu of additional formal education required by the state served all of the various government interests advanced in support of the law. *Id.* at 221-34. There was, therefore, no conflict of interests at all, and the religious practice could be accommodated.

Both *Sherbert* and *Thomas* involved persons who left their jobs because of religious principles and were denied unemployment benefits because the state did not recognize religious conviction as an acceptable basis for refusing employment. In *Thomas*, the state claimed that the statute was intended to avoid widespread unemployment, but failed to show that treating religious scruples as "good cause" for refusing employment, as do most other states, would have any impact upon unemployment. 450 U.S. at 719. Thus, there was no significant state interest that could not be fulfilled while accommodating plaintiffs' free exercise rights. In contrast, petitioners' asserted right to discriminate directly conflicts with the government's interest in eliminating racial discrimination in schools and cannot possibly be accommodated.[68]

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[68] This Court has consistently rejected a First Amendment basis for the "right" to discriminate: " 'The Constitution . . . places no

A final and crucial distinction between these cases and those relied upon by petitioners is that the government interest here is far more compelling because of its constitutional foundation. Indeed, it can fairly be said that "[a] more compelling governmental interest has perhaps never been enlisted in opposition to a free exercise claim." *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 322-23 (5th Cir. 1977) (Goldberg, J., concurring), *cert. denied*, 434 U.S. 1063 (1978).

Goldsboro nonetheless argues that the government interest in this case is insubstantial because only a relatively small percentage of students currently attend church-related schools. G. Br. at 41. *Norwood v. Harrison* rejected that argument on the ground that the Government is constitutionally prohibited from aiding racially discriminatory schools regardless of the number of students involved. 413 U.S. at 467. In any event, petitioners' focus is much too narrow, because others may seek to bring themselves within the exception if granted. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 652 (1981). The history of the desegregation struggle since *Brown v. Board of Education* reflects all too clearly that many persons, and some political entities, are prepared to go to extreme lengths to avoid nonsegregated education.[69]

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value on discrimination,' . . . and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'" *Runyon v. McCrary*, 427 U.S. at 176 (quoting *Norwood v. Harrison*, 413 U.S. 455, 463 (1973)). This same analysis has been applied to petitioners' religiously-based First Amendment claims. *Bob Jones University v. Johnson*, 396 F. Supp. 597, 607 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

[69] See, *e.g.*, *Norwood v. Harrison*, 413 U.S. at 467 n.9; *Griffin v. County School Board*, 377 U.S. 218 (1964); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 856-57 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968); *Brown v. Dade Christian Schools Inc.*, 556 F.2d at 324 (Goldberg, J., concurring).

The concerns expressed in several of the briefs *amici curiae*—that all religions which discriminate on any basis may lose their tax-exempt status—are unfounded. First, these cases do not involve institutions devoted exclusively to religious worship, and therefore do not deal "with the right of the government to interfere . . . with the 'internal affairs of the church itself' " as some *amici curiae* fear.[70] Nor do these cases involve seminaries or other institutions devoted exclusively to sectarian education. Rather, petitioners are educational institutions which offer secular education to the public on a commercial basis in competition with the public schools and other private schools. *Goldsboro*, 436 F. Supp. at 1316; see *supra* at 42-43. They may thus be required to conform to neutral laws of general application which govern education. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); see also *United States v. Lee*, 102 S. Ct. 1051, 1056 (1982); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Bob Jones also asserts that § 501(c)(3) violates the Establishment Clause, arguing that § 501(c)(3) gives a "tax preference" to sectarian schools which do not practice racial discrimination. That contention is simply an insufficient basis for an Establishment Clause claim. *Harris v. McRae*, 448 U.S. 297, 319-20 (1980). Obviously, a statute does not violate the Establishment Clause merely because it "happens to coincide with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442-44 (1961). In addition to showing that the statute affects different religions differently, "a claimant . . . must be able to show the absence of a neutral, secular basis for the lines government has drawn." *Gillette v. United States*, 401 U.S. 437, 452 (1971). Petitioner makes no such showing.

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[70] See, *e.g.*, Brief Amicus Curiae of the Center for Law and Religious Freedom of the Christian Legal Society in Support of Petitioner at 5-7; Brief Amici Curiae of the American Baptist Churches in the USA joined by the United Presbyterian Churches in the USA at 10-12.

If anything, granting sectarian schools a special exemption from the § 501(c)(3) nondiscrimination requirement would raise Establishment Clause problems. If government exercises its discretion to provide limited forms of neutral aid to sectarian schools, that aid must be sufficiently restricted to assure that it cannot be used to advance the school's religious activities. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 774 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). There is no doubt that tax benefits can constitute government aid for these purposes and that such aid is impermissible if it advances the school's religious activities. *Nyquist*, 413 U.S. at 790-91. Here the asserted basis for a special exception from the general rule requiring nondiscrimination is specifically to facilitate petitioner's religiously-based practice of racial discrimination. Granting the exemption in these cases thus would impermissibly support both racial discrimination and religious activities.

Creation of a special exception for religiously-motivated racial discrimination would also entangle the government in questions of religious beliefs. If religiously-based racial discrimination were given a tax preference unavailable to other institutions that discriminate on the basis of race, there would be a strong incentive for such institutions to posit a religious basis for their discriminatory practices, *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Goldberg, J., concurring), and the danger of fraudulent claims would be substantial. See *Gillette v. United States*, 401 U.S. at 460. The government would have to examine each institution's policies and determine whether the beliefs, however sincerely held, were in fact religious. See *Wisconsin v. Yoder*, 406 U.S. at 215-16. That is a particularly inappropriate form of government involvement in religion. See *Gillette v. United States*, 401 U.S. at 454-57; *McGowan v. Maryland*, 366 U.S. at 516-20 (separate opinion of Frankfurter, J.).

All of these factors lead to the conclusion that Congress would have raised serious Establishment Clause problems had it chosen to grant petitioners a special exemption from the general rule that the government will not aid private schools which discriminate on the basis of race. The path Congress chose instead is a neutral law of general application which minimizes government entanglement with religion and, as such, is constitutional.

CONCLUSION

For the reasons stated, this Court should affirm the judgments of the court below. The Commissioner's interpretation of the Internal Revenue Code is fully supported by the statutory language and by overwhelming evidence of congressional intent, and is in fulfillment of his constitutional duty to ensure that the federal government in no way supports the maintenance of racially segregated or discriminatory schools.

Respectfully submitted,

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Appendix

APPENDIX A

Rev. Rul. 71-447

The Internal Revenue Service has been asked whether a private school that otherwise meets the requirements of section 501(c)(3) of the Internal Revenue Code of 1954 will qualify for exemption from Federal income tax if it does not have a racially nondiscriminatory policy as to students.

A "racially nondiscriminatory policy as to students" is defined as meaning that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Section 501(c)(3) of the Code provides, among other things, for the exemption from Federal income tax of organizations "organized and operated exclusively for religious, charitable, * * * or educational purposes."

Section 1.501(c)(3)-1(d)(3)(ii) of the Income Tax Regulations provides that a primary or secondary school that has a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on may qualify for exemption as an educational organization of the character contemplated by Code section 501(c)(3) if it otherwise meets the requirements of that section.

Under common law, the term "charity" encompasses all three of the major categories identified separately under section 501(c)(3) of the Code as religious, educational, and charitable. Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being "organized and operated exclusively for religious, charitable, * * * or educational purposes" was

intended to express the basic common law concept. Thus, a school asserting a right to the benefits provided for in section 501(c)(3) of the Code as being organized and operated exclusively for educational purposes must be common law charity in order to be exempt under that section. That Congress had such an intent is clearly borne out by its description in section 170(c) of the Code of a deductible gift to "a corporation, trust, fund, or foundation * * * organized and operated exclusively for educational purposes" as a "charitable contribution." The Service has followed this concept, as is reflected in Rev. Rul. 67-325, C.B. 1967-2, 113, 116-117, which reads:

> * * * (S)ections 170, 2055, 2106, and 2522 of the Code, to the extent they provide deductions for contributions or other transfers to or for the use of organizations organized and operated exclusively for charitable purposes, or to be used for charitable purposes, do not apply to contributions or transfers to *any* organization whose purposes are not charitable in the generally accepted legal sense or to any contribution for any purpose that is not charitable in the generally accepted legal sense. For the same reasons, section 501(c)(3) of the Code does not apply to any such organization.

Also see section 1.501(c)(3)-1(d)(2) and (3) of the regulations; *Amy Hutchinson Crellin* v. *Commissioner*, 46 B.T.A. 1152(1942), and authorities cited therein.

All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy. This principle has been stated as follows in the *Restatement (Second), Trusts* (1959) Sec. 377, Comment c:

> A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid.

Although the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law, the policy of the United States is to discourage discrimination in such schools. The Federal policy against racial discrimination is well-settled in many areas of wide public interest as, for example, in transportation, housing, employment, hotels, restaurants and theaters. A recognition of a public interest in eliminating racial discrimination is shown in section 1.501(c)(3)-1(d)(2) of the regulations providing that the "promotion of social welfare" includes activities "to eliminate prejudice and discrimination."

Developments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. Titles IV and VI, The Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241, 42 U.S.C. 2000c, 2000c-6 and 2000d and *Brown* v. *Board of Education*, 347 U.S. 483, 500 (1954), and many subsequent Federal court cases, demonstrate a national policy to discourage racial discrimination in education, whether public or private.

The issue here is whether a private school that does not have a racially nondiscriminatory policy as to students is "charitable" within the common law concepts found in section 501(c)(3). The foregoing discussion demonstrates that racial discrimination in education is contrary to Federal public policy. Therefore, a school not having a racially nondiscriminatory policy as to students is not "charitable" within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.

1971-2 C.B. 230.

APPENDIX B

Nineteenth Century State Constitutional and Statutory Tax Exemption Provisions Containing Language Comparable to That Found in § 501(c)(3)

Ala. Const. of 1875 art. IV, § 52 ("lots . . . used exclusively for religious worship, for schools, or for purposes purely charitable"); Ala. Code tit. 7, § 451(2) (1887) (same language) (enacted 1875-76 Ala. Laws No. 1, at 44 (1876)); Ala. Rev. Code tit. 7, ch. 3, § 433(4) (1867) ("property of literary, scientific, and benevolent institutions") (enacted 1866-67 Ala. Acts No. 260, at 260 (1867)).

Colo. Gen. Stat. ch. XCIV, § 2815 (1883) ("buildings . . . used solely and exclusively for religious worship, for schools, or for strictly charitable purposes"); Colo. Rev. Stat. ch. LXXV, § 2 (1867) (territorial legislature) ("buildings of library, scientific, benevolent, and religious institutions").

Conn. Gen. Stat. tit. 76, § 3820 (1888) ("buildings belonging to and used exclusively for scientific, literary, benevolent, or ecclesiastical societies"); Conn. Stat. tit. LV, § 6 (1854) ("buildings belonging to scientific, literary, benevolent or ecclesiastical societies, used exclusively for scientific, literary, benevolent or religious purposes").

Del. Rev. Stat. ch. 44, § 1098 (1915) (all real and personal property "used for educational or school purposes, or any corporation created for charitable purposes"); Del. Rev. Stat. tit. II, ch. 11, at 114 (1852, amended to 1893) (property belonging to a "church, religious society, college or school, or to any corporation for charitable uses"); see also 1877 Del. Laws ch. 16 ("legacies for religious, charitable and educational purposes").

Fla. Const. of 1887 art. IX, § 1 (property "for municipal, educational, literary, scientific, religious or charita-

ble purposes"); Fla. Rev. Stat. tit. VI, § 332 (1892) ("property of all literary, benevolent, charitable and scientific institutions") (enacted 1887 Fla. Laws No. 1, at 2); Fla. Laws ch. 174, § 13(3) (McClellan's Digest 1881) (same language) (enacted 1881 Fla. Laws No. 1, at 2).

Ill. Const. of 1870 art. IX, § 3 (property used "for school, religious, cemetery and charitable purposes").

Ind. Const. of 1851 art. 10, § 1 (§ 193) (property used "for municipal, educational, literary, scientific, religious, or charitable purposes"); Ind. Rev. Stat. ch. 98, § 8525 (1892) (property used for "educational, literary, scientific or charitable purposes") (enacted 1881 Ind. Acts ch. XCVI, at 613); Ind. Rev. Stat. ch. 12, § 5(7) (1843) (buildings "of any literary, benevolent, charitable, or scientific institution").

Iowa Code Ann. tit. 6, § 1271(1) (McClain 1888) ("buildings of literary, scientific, benevolent, agricultural, and religious institutions"); Iowa Rev. Stat. tit. VI, § 711 (1860) (same language); Iowa Code tit. VI, ch. 37, § 455 (1850-51) ("buildings of library, scientific, benevolent, and religious institutions or societies").

Kan. Const. of 1859 art. 11, § 1 ("property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes"); Kan. Comp. Laws ch. 107, § 6212 (1885) ("buildings belonging to scientific, literary or benevolent associations, and . . . moneys and credits belonging exclusively to universities, colleges, academies or public schools of any kind, or to religious, literary, scientific or benevolent and charitable institutions or associations") (enacted 1876 Kan. Laws ch. 34, at 55).

Me. Rev. Stat. Ann. tit. 1, ch. 6, § 6 (1871) ("the real and personal property of all literary institutions, and the

real and personal property of all benevolent, charitable and scientific institutions").

Mass. Rev. Laws ch. 12, § 5 (1902) ("property of literary, benevolent, charitable and scientific institutions"); Mass. Pub. Stat. ch. 11, § 5 (1882) (same language); see also 1874 Mass. Acts ch. 375, at 413 (property of association taxable unless used for "literary, educational, benevolent, charitable, scientific or religious purposes").

Mich. Comp. Laws ch. 98, § 3830(4) (1897) (property "owned and occupied by library, benevolent, charitable, educational and scientific institutions") (enacted 1893 Mich. Laws No. 206, at 355); Mich. Rev. Stat. tit. V, ch. 20, § 5(4) (1846) ("property of all library, benevolent, charitable and scientific institutions").

Miss. Code Ann. ch. 116, § 3744(d) (Thompson, Dillard & Campbell 1892) ("property, real or personal, belonging to any religious or charitable society, or incorporated institution for the education of youth").

Mo. Const. of 1875 art. X, § 6 ("lots . . . used exclusively for religious worship, for schools, or for purposes purely charitable"); Mo. Rev. Stat. ch. 138, § 7504 (1889) (same language) (enacted 1877 Mo. Laws 393).

Neb. Const. of 1875 art. IX, § 2 (property used "for school, religious, cemetery and charitable purposes"); Neb. Stat. Ann. ch. 46, § 3898 (Cobbey 1891) (same language) (enacted 1879 Neb. Laws 276, 277); Neb. Rev. Stat. ch. XLVI, § 1 (1866) ("buildings of library, scientific, benevolent and religious institutions") (enacted 1857 Neb. Laws 147 (territorial legislature)).

Nev. Const. of 1864 art. X, § 1 (property used "for municipal, educational, literary, scientific, religious, or charitable purposes"), amended 1903 Nev. Stat. 240 (property "for municipal, educational, literary, scientific or other charitable purposes").

N.M. Const. of 1911 art. VIII, § 7 ("all church property, all property used for educational or charitable purposes"); N.M. Stat. Ann. ch. CVII, § 5430 (1915) (property of "literary, scientific, benevolent, agricultural and religious institutions and societies"); N.M. Comp. Laws tit. XLI, § 2808 (1884) (territorial legislature) (same language) (enacted 1882 N.M. Laws ch. 62, at 110).

N.Y. Tax Law § 4(7) (Birdseye 1895) (property of a corporation or association organized "for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes"); 1893 N.Y. Laws ch. 498, at 1077 (property of a corporation or association organized "for religious, charitable, missionary, hospital, educational, patriotic, historical or cemetery purposes").

N.C. Const. of 1868 art. V, § 6 ("property held for educational, scientific, literary, charitable, or religious purposes"); N.C. Rev. Stat. ch. 110, § 5107 (Womack, Gulley & Rodman 1905) ("property held for the benefit of churches, religious societies, charitable, educational, literary or benevolent institutions").

N.D. Const. of 1889 art. 11, § 176 ("property used exclusively for school, religious, cemetery or charitable purposes"); N.D. Rev. Code ch. 18, § 1177(5) (1895) ("buildings of library, scientific, educational, benevolent and religious institutions, colleges or societies"); Dak. Terr. Comp. Laws ch. 15, § 1542(5) (Caldwell & Price 1887) (same language) (enacted 1879 Dak. Laws ch. XLVIII, at 111).

Okla. Rev. Stat. Ann. ch. 75, § 5914 (Wilson 1903) ("buildings of library, scientific, educational, benevolent and religious institutions, colleges or societies").

Or. Const. of 1859 art. IX, § 1 (property used "for municipal, educational, literary, scientific, religious, or

charitable purposes"); Or. Code tit. XXVIII, § 3554(3) (Lord 1910) ("property of all literary, benevolent, charitable and scientific institutions") (enacted 1853-55 Ore. Stat. 430, 431 (1854) (territorial legislature)).

Pa. Stat. § 20546 (1920) ("all hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence or charity") (enacted 1874 Pa. Laws No. 94).

S.D. Const. of 1889 art. XI, § 152 (property used "for school, religious, cemetery and charitable purposes").

Tenn. Const. of 1870 art. II, § 28 (property "held and used for purposes purely religious, charitable, scientific, literary or educational"); Tenn. Code Ann. tit. 5, § 689 (2) (Shannon 1896) ("property belonging to any religious, charitable, scientific, literary, or educational institution") (enacted 1889 Tenn. Laws ch. 96, at 145); Tenn. Code tit. 5, § 542 (1858) ("property of any literary, scientific, or benevolent institutions . . . houses of religious worship and . . . [l]ands appropriated for the use of schools"); 1835 Tenn. Laws ch. 13, § 2 (reprinted at Tenn. Comp. Stat. 602 (1836)) ("stocks owned by . . . literary, religious or charitable institutions").

Vt. Stat. tit. 10, § 362(VII) (1894) (property "used for public, pious or charitable uses; lands leased by towns for educational purposes, and lands owned or leased by colleges") (enacted 1855 Vt. Laws No. 43, at 46) (origins date to 1787 Vt. Laws 11).

W.Va. Const. of 1872 art. X, § 1 ("property used for educational, literary, scientific, religious or charitable purposes").

Wisc. Stat. Ann. § 1038(3) (1889) (property "owned by any religious, scientific, literary, or benevolent association") (enacted 1868 Wisc. Laws ch. 130, at 131).

Amicus Brief

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MOTION FILED
AUG 25 1982

Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

BOB JONES UNIVERSITY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF INDEPENDENT SECTOR IN SUPPORT OF AFFIRMANCE

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION OF INDEPENDENT SECTOR FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rules 36 and 42 of the Rules of the Court, Independent Sector respectfully requests leave to file the attached brief *amicus curiae.*

Independent Sector, a coalition of over 400 national voluntary organizations, corporations, and foundations, seeks leave to address the merits of this controversy because it is vitally concerned about the potential im-

pact of the Court's decision on tax-exempt organizations generally.* Several *amici* have invited the Court to affirm the decisions below on the ground that the government may not constitutionally grant preferred tax treatment to organizations that discriminate on the basis of race. Respondent's argument that the statute does not authorize the Internal Revenue Service to deny exempt status to such organizations increases the danger that the Court may base its decision on constitutional grounds. Independent Sector is concerned that a constitutionally based affirmance could have unintended adverse consequences for exempt organizations that differentiate on bases other than race.

The attached brief is submitted in the interest of avoiding such unintended consequences. It presents statutory arguments for affirmance that have been ignored in most of the briefs already on file, and it discusses some of the reasons why a nonconstitutional holding in these cases is desirable. Furthermore, in recognition of the possibility that the Court may find it necessary to decide these cases on constitutional grounds, the brief outlines a principled basis for approaching the constitutional issue and for circumscribing a constitutional holding so as to avoid producing adverse consequences for charitable organizations generally. In this regard, Independent Sector's views present a new perspective on these cases, and we believe they may assist the Court in reaching a just result.

Because Independent Sector wishes to present views supporting affirmance of the lower court's decisions, the closing date for filing this motion and the attached brief ordinarily would have been March 3, 1982, the date respondent's brief was due. As the Court is aware, however, respondent's brief repudiated its earlier position and argued that the decisions below should be reversed.

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* A fuller description of Independent Sector and its interest in these cases is set forth at pages 1-3 of the attached brief.

In light of respondent's changed position, on April 19, 1982 the Court appointed William T. Coleman, Jr., Esq. *amicus curiae* to advocate the validity of the lower court's decisions in these cases. Mr. Coleman's brief is due August 25, 1982. Since Independent Sector wishes to present views in support of the position Mr. Coleman represents, and since none of the parties would be prejudiced so long as those views are presented at or before the time his brief is filed, Independent Sector respectfully requests the Court to treat this motion and the attached brief as timely filed for purposes of Rule 36.

Counsel for Independent Sector contacted the parties to this case and requested their consent to the filing of the attached brief. Counsel for petitioner Bob Jones University declined to provide such consent; counsel for petitioner Goldsboro Christian Schools stated that he is concerned that the filing may be untimely, but otherwise would be willing to consent. The written consent of the Acting Solicitor General is attached.

Accordingly, Independent Sector respectfully requests the Court to grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF INDEPENDENT SECTOR IN SUPPORT OF AFFIRMANCE

INTEREST OF AMICUS CURIAE

Independent Sector ("IS") is a coalition of over 400 national voluntary organizations, corporations, and foundations created in 1980 to preserve and enhance the national tradition of giving, volunteering, and not-for-profit

initiative.[1] Its major objectives are to improve the public's understanding of America's nongovernmental, or independent, sector of organizations created to serve community purposes; to promote communications within that sector in order to identify shared problems and opportunities; to perform research designed to improve knowledge about the independent sector; to encourage effective management of nonprofit organizations; and to facilitate relations between the independent sector and national, state, and local governments.

IS and most of its members are nonprofit charitable organizations. Their revenues are tax-exempt under 26 U.S.C. § 501(c)(3) (1976), and contributions to them are tax-deductible under 26 U.S.C. §§ 170(a) and (c) (1976).

Because of their interest in private philanthropy and charitable organizations, IS and its members are vitally concerned with the outcome of this litigation. They believe that the Internal Revenue Service (the "IRS" or the "Service") and the lower court ruled correctly that the practice of racial discrimination disqualifies a nonprofit organization from Section 501(c)(3) status, and they urge this Court to affirm that ruling. At the same time, IS has an interest in this Court's basing its affirmance on a construction of the statute rather than on the proposition, urged by several *amici*, that tax-exempt status is equivalent for constitutional purposes to governmental support.

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[1] IS is the successor of the Coalition of National Voluntary Organizations and the National Council on Philanthropy, which merged effective January 1, 1980 to create IS. A copy of IS' membership list is appended to this brief.

IS acts in this matter through its Board of Directors. IS' 400 members are listed in the Appendix for identification purposes only. This listing does not imply that each of the member organizations has taken a position on this brief.

A holding equating exempt status with federal financial assistance for constitutional purposes would imperil the very independence of the independent sector. If this Court should blur the distinction between private charitable activity and governmental action, the result could be to discourage independent public service by inviting attempts to subject exempt organizations and their donors to federal and state regulation. As Judge Friendly has observed, "If the federal courts take over the supervision of philanthropy, there will ultimately be no philanthropy to supervise."[2] This brief is submitted in the interest of avoiding that result.

SUMMARY OF ARGUMENT

Section 501(c)(3) of the Internal Revenue Code, together with its companion provision, Section 170(c), grant preferred tax treatment to nonprofit organizations whose activities benefit the public and to those who contribute to such organizations. Those sections were not designed, nor should they be interpreted, to encourage private activity that violates the clearly defined public policy against racial discrimination.

That exempt organizations must benefit the public is evident not only from the language of the statutory provisions but also from their legislative history. Congress has emphasized repeatedly that tax exemptions are justified by the public benefit that exempt organizations confer, and the courts have relied on that rationale in interpreting the exemption sections. Petitioners' argument that religious or educational organizations are entitled to exempt status regardless of how abhorrent their activities may be to public policy stands congressional intent on its head.

Congress and the courts have made clear that the practice of racial discrimination negates any public benefit

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[2] *Jackson v. Statler Foundation*, 496 F.2d 623, 640 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (Friendly, J., dissenting from denial of rehearing *en banc*).

a nonprofit organization might otherwise confer. This Court has emphasized repeatedly that racial discrimination, particularly in an educational setting, is contrary to basic constitutional principles. Congress has ratified and extended that view by enacting federal statutes designed to eradicate racial discrimination. And the law of charitable trusts recognizes that racial discrimination so affects an otherwise "charitable" activity that it no longer can be considered to serve the public interest.

Even if there were no clear indication of congressional intent to limit exempt status to organizations that confer a public benefit, this Court should not ascribe to Congress an intent to provide preferred tax treatment to organizations that discriminate on the basis of race. This Court's prior decisions establish that the tax laws should not be construed in a way that would frustrate sharply defined public policy.

Furthermore, Congress, quick to modify IRS actions of which it disapproves, has implicitly ratified the denial of tax-exempt status to organizations practicing racial discrimination. In the twelve years since the original IRS ruling involved here, Congress frequently has had the opportunity to enact new legislation in this area but has refused to alter the IRS practice. Instead, it has sent clear signals that denial of tax-exempt status to racially discriminatory organizations is fully consistent with the intent behind Section 501(c)(3).

The evidence compels a conclusion that the IRS position is consistent with the language and intent of Section 501(c)(3). That conclusion makes it unnecessary to decide whether granting tax exemptions to schools that discriminate on the basis of race would violate the Fifth Amendment. The principle of avoiding unnecessary constitutional adjudication should be applied here because a holding that equated tax exemptions to government financial aid for constitutional purposes could disrupt what is today a clear delineation between public and private activities conducted for the public good. This Court can and

should avoid such disruption by deciding this case on statutory grounds.

If this Court nevertheless finds it necessary to reach the constitutional issue in order to affirm, its holding should be carefully limited to avoid adverse effects on charitable organizations and their patrons. First, the Court should explicitly avoid suggesting that impermissible governmental action necessarily would be found where a tax-exempt organization makes distinctions on some basis other than race. Second, it would be undesirable for this Court to create any basis for an implication that exempt organizations are de facto arms of the government, or that they are subject to the same constitutional and legal constraints that apply to the government. Careful limitation of any constitutional ruling is critical to preserving the tradition of vigorous private philanthropic activity in this country.

ARGUMENT

I. The IRS Properly Interpreted Sections 501(c)(3) and 170(c) As Denying Exempt Status to Organizations That Discriminate on the Basis of Race.

The central issue in this case is whether preferred tax treatment should be extended to religious or educational organizations that discriminate on the basis of race. Both the statutory framework and the legislative history show that tax exemptions are designed to encourage private nonprofit activities beneficial to the public. Congress has made clear that an organization is not entitled to preferred tax treatment simply because it confers some public benefit, if its activities violate fundamental public policy. Constitutional commands, judicial decisions, and congressional enactments establish that the practice of racial discrimination is so fundamentally at odds with public policy that it negates, for this purpose, any public benefit an organization might otherwise provide. Petitioners, who admittedly engage in racial dis-

crimination, do not satisfy the public-benefit test, and the IRS properly denied them exempt status. Congress has been aware of this ruling by the Service and has indicated its approval of it.

A. *Congress intended to deny preferred tax treatment to organizations whose activities violate a fundamental public policy such as the policy against racial discrimination.*

The underlying purpose behind Sections 501(c)(3) and 170(c) is the promotion of private, nonprofit activities that benefit the public.[3] This purpose is evident not only from the kinds of organizations listed in Section 501(c)(3)—those "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . or for the prevention of cruelty to children or animals"—but also from the fact that "Section 170 of the Code, the companion provision to 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes. 26 U.S.C. § 170(c)(2)(B)."[4]

Congress' intent to exempt only organizations whose activities benefit the public also is manifest in the legislative history and has been recognized by this Court. As the Senate sponsor of the predecessor of the current exemption provision explained, the exemption was designed to relieve from tax those institutions "devoted exclusively

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[3] This is not to say that an exempt organization must be in strict harmony with prevailing public views about what is advantageous to society, but only that the activities of the organization should not be contrary to a fundamental public policy such as the policy against racial discrimination.

[4] *United States v. Bob Jones University*, 639 F.2d 147, 151, n.6 (4th Cir. 1981). *See also* 26 U.S.C. § 642(c) (1976) ("Deduction for amounts paid or permanently set aside for a charitable purpose").

to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse."[5] This Court noted that purpose in its first decision interpreting the exemption provision: "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."[6] And the House Committee Report that accompanied the immediate statutory predecessor of Section 501(c)(3) confirmed that the primary rationale for the exemption is public benefit:

> "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare."[7]

Petitioners and the United States make much of the fact that Section 501(c)(3) lists qualifying charitable activities in the disjunctive. They contend that a nonprofit organization that qualifies as "educational" or "religious" is automatically entitled to an exemption

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[5] 44 Cong. Rec. 4150 (1909) (remarks of Senator Bacon). The notion of exempting charitable organizations from taxation has its roots in the English Statute of Charitable Uses, enacted in 1601. A leading history of the subject states that "[p]ublic benefit was the key to the statute . . . ." G. Jones, *History of the Law of Charity 1532-1827*, at 27 (1969).

[6] *Trinidad v. Sagrada Orden*, 263 U.S. 578, 581 (1924). *See also McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972) (three-judge court) ("The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the Government relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government.").

[7] H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938).

even if some of its activities violate public policy.[8] But that argument proves too much. As the late Judge Leventhal observed, it would lead to the conclusion that Fagin's school for pickpockets was entitled to a tax exemption.[9] Similarly exempt would be institutions established to train terrorists, religious groups devoted to practicing human sacrifice, or scientific groups committed to the development and distribution of illegal drugs. Such activities plainly fail to meet Congress' central "public benefit" criterion.

Congress never intended to grant preferred tax treatment to organizations whose activities violate fundamental public policy, even if they also happen to be engaged in one of the charitable pursuits listed in Section 501(c)(3). Rather, it intended to exempt organizations that confer a public benefit without flouting public policy. Unless petitioners can meet the public-benefit requirement, the fact that they are educational or religious is insufficient. This conclusion and its underlying principles are fully explicated in *Green v. Connally*, *supra*, and need no elaboration in this brief.

B. *Petitioners' racially discriminatory policies negate, for purposes of these tax provisions, any public benefit their religious or educational activities might otherwise provide.*

Once it is recognized that a nonprofit religious or educational organization is disqualified from preferred tax status if its activities violate an established, fundamental public policy, petitioners' statutory argument collapses. Few public policies are as firmly established, or have such explicit constitutional foundations, as that against

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[8] Brief for Petitioner Bob Jones University 12-13; Brief for Petitioner Goldsboro Christian Schools 15-17; Brief for the United States 13-18.

[9] *See Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C.), *aff'd per curiam sub nom. Coit v. Green*, 404 U.S. 997 (1971).

racial discrimination. Whatever room there may be in the exemption sections for organizations that engage in other types of questionable conduct, there is none for organizations that discriminate on the basis of race. Decisions of this Court and of the lower courts over the past 30 years establish conclusively that the practice of racial discrimination in any form is so intolerable that it negates, for these purposes, any public benefit the organization might otherwise confer.

Race or color is the only classification expressly forbidden by the Constitution.[10] This Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), relied on that prohibition in giving full force to the nation's public policy against racial discrimination in education. Since that decision, there has been no retreat from the principle that racial discrimination in education is repugnant to the constitutional values to which the nation is committed. Rather, Congress has extended that principle by providing in Title VI of the Civil Rights Act of 1964 that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [11] And this Court has made clear that, under 42 U.S.C. § 1981 (1976), even a private, commercially operated, nonsectarian school may not deny admission on the basis of race. *Runyon v. McCrary*, 427 U.S. 160 (1976).

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[10] Amendment XV provides, in pertinent part, that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The other Civil War Amendments, XIII and XIV, are rooted in the same attitude of repugnance toward racism. No other classification has an equivalent status under the Constitution.

[11] Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964), codified at 42 U.S.C. § 2000d (1976).

The strength of this policy against racial discrimination was underscored in *Norwood v. Harrison*, 413 U.S. 455 (1973), in which this Court struck down on constitutional grounds a state program for lending textbooks to private schools, including schools practicing racial discrimination. While recognizing that private schools fulfill an "important educational function," the Court went on to state that, where "the legitimate educational function cannot be isolated from discriminatory practices . . . [the] discriminatory treatment exerts a pervasive influence on the entire educational process." *Id.* at 469. Thus, the Court concluded that a state could not provide any "tangible financial aid" to such schools.

The rule that racial discrimination is irreconcilable with public benefit also has been recognized by this and other courts in the area of charitable trust law. Thus, provisions that restrict the beneficiaries of a charitable trust to persons of a given race routinely have been held to be unenforceable.[12] In order to give effect to such trusts, courts have applied the *cy pres* doctrine to remove racial restrictions.[13] And in cases where removing racial restrictions would have contravened the settlor's intent, the courts have held the entire trust void.[14]

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[12] *See, e.g., Evans v. Newton*, 382 U.S. 296 (1966); *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957); *Pennsylvania v. Brown*, 373 F.2d 771 (3d Cir. 1967); *Sweet Briar Institute v. Button*, 280 F. Supp. 312 (W.D. Va. 1967) (three-judge court); *Coffee v. Wm. Marsh Rice Univ.*, 408 S.W.2d 269 (Tex. Civ. App. 1966). *See also Green v. Connally*, *supra*, 330 F. Supp. at 1160 ("The cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities.").

[13] *See, e.g., Lockwood v. Killian*, 172 Conn. 496, 375 A.2d 998 (1977); *Trammell v. Elliott*, 230 Ga. 841, 199 S.E.2d 194 (1973). *See also* Bogert & Bogert, *The Law of Trusts and Trustees* § 378 (Rev. 2d ed. 1977).

[14] *See, e.g., Evans v. Abney*, 224 Ga. 826, 165 S.E.2d 160 (1968), *aff'd*, 396 U.S. 435 (1970); *LaFond v. City of Detroit*, 357 Mich. 362, 98 N.W.2d 530 (1959).

It is also established in charitable trust law that if no method can be found for separating the charitable from the noncharitable aspects of a trust, the entire trust is void.[15] Similarly, because petitioners' racially discriminatory practices exert a pervasive influence on their religious and educational functions, *Norwood v. Harrison*, *supra*, 413 U.S. at 469, those ordinarily beneficial functions are tainted and their exemption claims must be denied.[16]

In short, the decisions of this Court and of the lower courts make clear that organizations that discriminate on the basis of race are not deemed to confer a public benefit. This being so, the fact that they are "educational" or "religious" organizations is insufficient. Whatever else they may be, petitioners are not the kind of nonprofit organizations whose activities Congress intended to encourage by providing preferred tax treatment.

C. *Even if congressional intent were less clear, this Court should not ascribe to Congress the intent to grant tax-exempt status to organizations whose activities violate public policy.*

This Court has held that the Internal Revenue Code should not be construed in a way that would frustrate public policy. In *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30 (1958), this Court held that fines paid for violations of state highway weight limits were not deductible under section 162 as "ordinary and necessary" business expenses. It declared that "[a] finding of 'necessity' cannot be made . . . if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced

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[15] Bogert & Bogert, *supra* note 13, § 372.

[16] *See generally Green v. Connally*, *supra* note 9; *Simon, The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 Tax L. Rev. 477, 496, 500 (1981).

by some governmental declaration thereof." [17] While the statute on its face contained no such exception, the Court refused to "presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State." [18]

The principle that the Code should not be construed to frustrate public policy is directly applicable to this case.[19] Congress created preferred tax status as a means of encouraging nonprofit activity that benefits the public. Since racial discrimination in education is so plainly contrary to the public interest, "The Code must be construed and applied in consonance with the Federal public policy

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[17] *Id.* at 33-34.

[18] *Id.* at 35. *See also Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326, 339 (1941) (corporate lobbying expenses held not deductible as ordinary and necessary business expenses on public policy grounds).

[19] The United States argues that the public policy doctrine has been limited by *Commissioner v. Tellier*, 383 U.S. 687 (1966) and by subsequent legislative action. Brief for the United States 25-26. However, the Court's concern in *Tellier* was that the public policy doctrine should not be applied to deny a deduction for legal expenses incurred in defending against criminal charges, since to deny the deduction would be to penalize the exercise of the constitutional right to counsel. 383 U.S. at 694. That consideration is not applicable to the case at bar. Furthermore, while Congress amended the statute to limit the relevance of public policy considerations under section 162, *see* Tax Reform Act of 1969, Pub. L. No. 91-172, § 902, 83 Stat. 487, 710 (1969), the doctrine has continued to be applied under other sections of the Code. *See, e.g, Holt v. Commissioner*, 69 T.C. 75 (1977), *aff'd*, 611 F.2d 1160 (5th Cir. 1980) (personal loss deduction denied for marijuana seized and forfeited); *Raymond Mazzei*, 61 T.C. 497 (1974) (personal deduction denied for theft loss incurred during involvement in illegal counterfeiting scheme). Moreover, as the court of appeals pointed out in its opinion below, since "section 501(c)(3) is rooted in public policy considerations", the public policy doctrine ought to have a broader scope with respect to it than it has under section 162, which merely defines taxable income. 639 F.2d at 152.

against support for racial segregation of schools, public or private." [20]

Where, as here, granting tax-exempt status would encourage private conduct that violates the fundamental public policy against racial discrimination, this Court should not construe the statute to permit the exemption in the absence of clear evidence that Congress intended that result. As we have shown, the legislative history not only contains no hint of congressional intent to confer preferred tax status on racially discriminatory organizations but indicates strongly that Congress intended the opposite result. Accordingly, the Service's position should prevail.[21]

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[20] *Green v. Connally, supra*, 330 F. Supp. at 1163. As the court observed in its seminal opinion in that case, the concepts of what constitutes a public benefit and what violates public policy receive their content from present legal and moral standards, rather than from those in existence when the initial exemption provision was enacted. "Calculations of community benefit are often difficult, and as time passes, conceptions of worthy purposes may change." *Id.* at 1158.

This principle has long been recognized in the charitable trust area. As Bogert has said:

> "The courts should be left free to apply the standards of the time. What is charitable in one generation may be noncharitable in a later age, and vice versa." *Bogert & Bogert, supra* note 13, § 369.

This is not the only area in which the Service's interpretation of § 501(c)(3) has changed as society's attitudes have evolved. For example, in 1975 the IRS ruled that public-interest litigation constitutes a charitable activity within the meaning of the statute. Rev. Proc. 75-13, 1975-1 C.B. 662; *see* Rev. Proc. 71-39, 1971-2 C.B. 575. Yet clearly the Congress that enacted the initial exemption provisions did not envision such organizations as being exempt. Simon, *supra* note 16, 36 Tax L. Rev. at 490.

[21] It is no answer for petitioners to assert that, "if the IRS is permitted to deny tax-exempt status to an organization on the ground that it has not complied with federal public policy, the ultimate result would be that the specific criteria for determining an organization's tax-exempt status under Section 501(c)(3) would

D. *Congress has ratified the Service's denial of exempt status to organizations that discriminate on the basis of race.*

The Service's position that the practice of racial discrimination disqualifies a nonprofit organization from Section 501(c)(3) tax-exempt status dates from 1970.[22] It was adopted in response to the issuance of a preliminary injunction in *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), prohibiting the IRS from according tax-exempt status to racially discriminatory private schools in Mississippi. That injunction was later made permanent in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), and affirmed by this Court in *Coit v. Green*, 404 U.S. 997 (1971) (*per curiam*). Since 1970, Congress has been fully aware of the Service's position, has repeatedly considered its propriety, and has refused to alter it.

One month after the IRS announced its position with respect to racially discriminatory schools, Commissioner Thrower testified before the Senate Select Committee on Equal Educational Opportunity in order to explain the Service's policy. Senator Mondale, the Chairman of the Committee, urged the Service to take vigorous action to enforce its new policy, and the Commissioner agreed to do so.[23]

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change every time the IRS determines that there has been a change in federal public policy." Brief for Petitioner Goldsboro Christian Schools 31. We have here no subtly perceived, ephemeral shift in public policy, but a well-established policy that has its roots in the Constitution, has been enunciated in numerous decisions by this Court, and has been further underscored by various congressional enactments.

[22] *See* Internal Revenue Service News Release, July 10, 1970, 7 Stand. Fed. Tax Rep. (CCH) ¶ 6790 (1970) (codified in Rev. Proc. 71-447, 1971-2 C.B. 230). *See also* Rev. Proc. 75-50, 1975-2 C.B. 587.

[23] *See Hearings Before the Select Senate Committee on Equal Educational Opportunity*, 91st Cong., 2d Sess., Part 3D—Desegregation Under Law, at 1992-2028 (1970).

In 1976, Congress codified the principle that racial discrimination is inconsistent with tax-exempt status by adding the provision now contained in 26 U.S.C. § 501(i) (Supp. II 1978), which denies preferred tax treatment to private social clubs that discriminate on the basis of race.[24] This provision was a direct response to the ruling by the three-judge district court in *McGlotten v. Connally*, 338 F. Supp. 448, 457-59, 462 (D.D.C. 1972), that recognition of racially segregated social clubs as tax-exempt entities under § 501(c)(7) did not violate the Code, the Constitution, or Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). In reporting the measure, both the Senate and House Committee Reports cited the three-judge district court's holding in *Green v. Connally, supra*, that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))."[25] It was of course unnecessary for Congress to legislate with respect to discriminatory schools, because the IRS position stemming from *Green* already denied them tax-exempt status.

The 1976 legislation demonstrates not only Congress' commitment to the principle of nondiscrimination, but also its willingness to overturn judicial decisions with which it disagrees. Correspondingly, Congress' citation of *Green*, coupled with its willingness to let that decision stand, must be taken as ratification of the ruling that racial discrimination disqualifies an educational organization under Section 501(c)(3).

Further evidence of Congress' awareness and approval of the policy against granting tax-exempt status to schools that discriminate on the basis of race is provided

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[24] Act of October 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697.

[25] S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976); H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).

by the legislative history of the Ashbrook and Dornan Amendments. In 1978, the IRS proposed a new set of *procedures* that would have required private schools seeking Section 501(c)(3) exemptions to provide evidence that they did not discriminate on the basis of race. Congress responded by stipulating in the Ashbrook and Dornan Amendments to the Treasury Department appropriations bill in 1980 [26] that none of the appropriated funds could be used to carry out the proposed IRS procedures, or "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 *unless in effect prior to August 22, 1978.*" (Emphasis added.)

Statements by sponsors of the amendments make clear that Congress' action was prompted by objections to the proposed procedures and that Congress did not intend to alter or limit the underlying policy against tax-exempt status for schools that discriminate on the basis of race. For example, Representative Dornan said:

> "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50. My amendment will protect thousands of innocent schools that would suffer if IRS adopts the proposed revised revenue procedure." [27]

Similarly, Senator Helms, who introduced the Ashbrook Amendment in the Senate, declared that under it:

> "IRS would still be able to enforce all regulations which were in effect as of August 22 of last year."

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[26] Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, §§ 103 (Ashbrook Amendment), 615 (Dornan Amendment), 93 Stat. 559, 562, 577 (1979).

[27] 125 Cong. Rec. H5982 (daily ed. July 16, 1979).

"The existing law provides substantial procedures for the IRS to deny the tax-exempt status of schools which discriminate."

"In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis." [28]

Finally, since the Service announced its policy on July 10, 1970, numerous bills have been introduced in Congress designed to modify the policy that a racially discriminatory private school is not "charitable" within the meaning of Section 501(c)(3) and not eligible for deductible contributions under Section 170.[29] None of them has been enacted. As this Court declared in comparable circumstances in *Runyon v. McCrary, supra*, "There could hardly be a clearer indication of congressional agreement with the view [of the Service] . . . ." [30]

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[28] 125 Cong. Rec. S11979-S11980 (daily ed. Sept. 6, 1979).

[29] *See* H.R. 68, 92d Cong., 1st Sess. (1971); H.R. 2352, 92d Cong., 1st Sess. (1971); H.R. 5350, 92d Cong., 1st Sess. (1971); H.R. 1394, 93d Cong., 1st Sess. (1973); S. 103, 96th Cong., 1st Sess. (1979); H.R. 1002, 96th Cong., 1st Sess. (1979); H.R. 1905, 96th Cong., 1st Sess. (1979); S. 449, 96th Cong., 1st Sess. (1979); S. 995, 96th Cong., 1st Sess. (1979); H.R. 332, 97th Cong., 1st Sess. (1981); H.R. 95, 97th Cong., 1st Sess. (1981); H.R. 802, 97th Cong., 1st Sess. (1981); H.R. 5186, 97th Cong., 1st Sess. (1981).

[30] 427 U.S. at 174-75, *citing Flood v. Kuhn*, 407 U.S. 258, 269-285 (1972); *Joint Industries Board v. United States*, 391 U.S. 224, 228-29 (1968). In *Runyon*, the Court addressed the question whether 42 U.S.C. § 1981 (1976) reaches private acts of racial discrimination. In holding that it does, the Court noted that Congress had "specifically considered and rejected an amendment" that would have overturned the Court's interpretation of that statute (in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)) as granting a right of action to the victim of discrimination. *Runyon v. McCrary, supra*, 427 U.S. at 173-74.

In sum, Congress has long been aware of the Service's policy of denying tax-exempt status to schools that discriminate on the basis of race, has repeatedly rejected legislative efforts to alter or limit the substance of that policy, and has ratified the policy by extending it to discriminatory private social clubs. As the Court has stated, "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation . . . , then presumably the legislative intent has been correctly discerned." [31] Under these circumstances, there can be no question but that the Service acted properly in refusing to accord petitioners preferred tax treatment.

II. This Court Need Not and Should Not Decide Whether Granting Preferred Tax Treatment to Nonprofit Organizations That Discriminate on the Basis of Race Would Violate the Constitution.

Several *amici* urge this Court to affirm the lower court's decisions on the ground that granting tax-exempt status to racially discriminatory private schools would violate the Fifth Amendment. In essence, they argue that a tax exemption confers a benefit on such organizations that is equivalent for constitutional purposes to direct governmental support. Pointing out that *Norwood v. Harrison*, *supra*, held that the government may not provide tangible financial aid to schools that discriminate on the basis of race, *amici* urge the Court to hold here that tax exemptions are likewise constitutionally objectionable.[32]

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[31] *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979), *quoting Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). *See also Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978); *Helvering v. Winmill*, 305 U.S. 79, 83 (1938).

[32] *See* Brief for the Lawyers Committee for Civil Rights Under Law 5-18; Brief for the American Civil Liberties Union and the American Jewish Committee 17-32; Brief of North Carolina Association of Black Lawyers 5-7.

This Court should decline the invitation of *amici* to decide this case on constitutional grounds. Quite apart from the fact that the constitutional equivalence of tax exemptions and direct financial support is questionable,[33] a holding that preferred tax treatment is legally equivalent to federal funding would raise a great variety of troublesome questions. For example, if tax-deductible contributions were treated as government funds, taxpayers making those contributions could be subject to some or all of the constraints the Constitution places on the government. It is not idle hyperbole to suggest that private philanthropy would be gravely impaired if individuals who make charitable contributions—large and small —were regarded as dispensers of government funds. Could individual parishoners, for example, make gifts to religious organizations without effecting the prohibited establishment of religion, or contributors to women's colleges do so without violating federal law? [34]

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[33] There are substantial legal and practical differences between tax exemptions and direct financial subsidies. "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to [exempt organizations] but simply abstains from demanding that [those organizations] support the state." *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). While an organization's tax-exempt status undoubtedly aids its fundraising efforts, its funds come from the private sector and their amount is determined by individual contributors rather than by the Government. Furthermore, a respectable body of opinion holds that tax exemptions such as the charitable exemption granted by § 501(c)(3) are primarily an income-defining device designed to implement "the congressional intent to tax only net income." *Tank Truck Rentals, Inc. v. Commissioner, supra*, 356 U.S. at 35. *See, e.g.*, Bittker, *Churches, Taxes and the Constitution*, 78 Yale L.J. 1285, 1288-89 (1969). Thus, it is by no means clear that tax exemptions and direct subsidies are analogous for constitutional or any other purposes.

[34] *See* Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1976)): "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

And what about the exempt organizations themselves? Would they become subject to the myriad regulations and legal obligations that accompany federal funding? If so, retirement homes operated by particular religious charities might be forced to admit persons of any creed;[35] private schools or organizations for girls or boys might have to become coeducational;[36] senior citizens groups might be forbidden to discriminate on the basis of age;[37] community centers designed to serve particular ethnic groups might have to open their doors to all comers;[38] and any exempt organization might be required to modify its physical facilities to provide access to the handicapped.[39] Resolving these and similar questions that might be raised by an overbroad holding in this case could occupy exempt organizations, their benefactors, the courts, and Congress for years to come.

The Court can and should avoid such a possibility by deciding this case on statutory grounds. As we have shown, the IRS properly interpreted the statute in denying tax exemptions to racially discriminatory schools. The further question whether Congress constitutionally could make such schools exempt need not and should not be reached. This Court should not " 'anticipate a ques-

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subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ."

[35] *Cf.* U.S. Const. amend. I.

[36] *See* 20 U.S.C. § 1681(a) (1976) (prohibits sex discrimination in federally funded educational programs).

[37] *See* 42 U.S.C. § 6102 (1976) (prohibits age discrimination in federally assisted programs).

[38] *See* 42 U.S.C. § 2000d (1976) (prohibits discrimination on the basis of national origin in federally funded programs).

[39] *See* 42 U.S.C. § 4151 (1976) (requires federally financed buildings to be accessible to the handicapped).

tion of constitutional law in advance of the necessity of deciding it'." [40]

III. If This Court Finds it Necessary to Rule That Granting Petitioners Tax-Exempt Status Would Violate the Constitution, It Should Make Clear That Its Holding Applies Only to Organizations That Discriminate on the Basis of Race.

If this Court should nevertheless find it necessary to resolve the constitutional issue in order to affirm, we believe it should circumscribe its holding carefully so as to minimize any adverse effect on charitable organizations and their donors. Specifically, if it rules that granting tax-exempt status to petitioners would constitute impermissible governmental action, it should avoid any suggestion either (1) that impermissible governmental action necessarily would be found where an exempt organization makes distinctions on some basis other than race, or (2) that exempt organizations are de facto arms of the government. Those questions should be reserved explicitly for future cases.

The constitutional significance of granting tax exemptions to racially discriminatory organizations depends on the extent to which exemptions encourage discrimination. That question would not be resolved by a finding that tax exemptions confer a benefit on the exempt organization. Clearly they do, for they reduce the organization's expenses and assist its fundraising efforts. But not every form of governmental assistance to even racially discriminatory organizations is unconstitutional.[41] This

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[40] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). *See also, e.g., Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) (the Court should not pass on constitutional questions unless their decision is unavoidable).

[41] *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) ("The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State.").

being so, the relevant question is whether granting tax benefits to petitioners would involve the government unconstitutionally in private discrimination. That question is essentially a state-action question.

State-action analysis has been applied in two different types of situations. In the more common situation, in which private conduct is challenged, the courts have asked whether there is sufficient governmental involvement so that the private conduct may fairly be treated as that of the government itself—in other words, whether the challenged private conduct is really discriminatory *governmental* action.[42] In the less common situation, in which the challenged conduct is that of the government itself, governmental action clearly is present and the relevant question has been whether that action sufficiently promotes private discrimination that it may fairly be treated as discriminatory.[43] The state action question here is of the second type: Governmental action, in the form of preferred tax treatment, clearly would be present if petitioners were exempt. The constitutional question the Court is being asked to decide is whether that governmental action would sufficiently promote petitioners' discriminatory policies that the grant of preferred tax treatment itself could fairly be treated as unconstitutional discrimination.[44]

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[42] *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Moose Lodge No. 107 v. Irvis*, *supra*, 407 U.S. at 176; *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

[43] *See Norwood v. Harrison*, *supra*; *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[44] *Cf. Norwood v. Harrison*, *supra*, 413 U.S. at 466 (a state may not grant tangible financial aid if doing so would tend significantly to "facilitate, reinforce, and support private discrimination"); *Reitman v. Mulkey*, *supra*, 387 U.S. at 381 (state constitutional provision forbidding the state to limit private housing discrimination held invalid on the ground it would "significantly encourage and involve the State in private discriminations"); *Jackson v. Statler Foundation*, *supra*, 496 F.2d at 637 (Friendly, J., dissenting from denial of rehearing *en banc*) ("the only question [is] whether

The national commitment to racial equality may inform, but it does not conclusively answer, the constitutional question whether preferred tax treatment amounts to unconstitutional governmental action. Preferred tax treatment is, at most, an extremely limited form of governmental involvement in private conduct. By contrast to the kinds of tangible aid to discriminatory organizations that the Court has struck down in prior cases,[45] "[a]n exemption or other tax benefit, available to a wide range of institutions, has always been regarded as the least possible form of government support, except for the police and fire protection provided all citizens."[46] This Court's decision in *Walz v. Tax Commission*, *supra*, makes clear that, for First Amendment purposes at least, tax-exempt status is not constitutionally significant.[47] While a different result might well obtain where an exempt organization discriminates on the basis of race,[48] the governmental action question is not without some difficulty.

The point we wish to emphasize, however, is not whether the constitutional issue is difficult or easy. The

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[governmental] action sufficiently promote[s] private racial discrimination to render the decisions impermissible for a government officer").

[45] *See, e.g., Norwood v. Harrison*, *supra* (textbook lending program); *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (exclusive use of municipal recreation facilities); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd mem.*, 389 U.S. 571 (1968) (tuition grant program).

[46] *Jackson v. Statler Foundation*, *supra*, 496 F.2d at 638 (Friendly, J., dissenting from denial of rehearing *en banc*).

[47] 397 U.S. at 675.

[48] *Cf. Norwood v. Harrison*, *supra*, 413 U.S. at 470 ("However narrow may be the channel of permissible state aid to sectarian schools . . . it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.").

important point is the limited significance that any resolution of that constitutional issue should have for future cases. Specifically, we submit that a holding that Congress could not constitutionally grant petitioners preferred tax treatment because of petitioners' racially discriminatory practices should not be viewed as undercutting the exempt status of organizations that draw distinctions on bases other than race or as making such organizations themselves or their contributors arms of the government that are subject to the constitutional restraints that bind the government.

In the first place, the objectionable private conduct in this case is racial discrimination. The government clearly does not have the freedom to assist organizations that discriminate on the basis of race that it may have to assist organizations that differentiate on other grounds. Racial equality occupies a special place in our constitutional jurisprudence, and the courts routinely have taken account of that fact by applying a less onerous state-action test in cases involving racial discrimination than in cases involving other constitutional claims.[49] While this Court has not expressly enunicated a two-tier state action

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[49] *Spark v. Catholic University of America*, 510 F.2d 1277, 1281-83 (D.C. Cir. 1975) (*per curiam*); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 879 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); *Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *Adams v. First National Bank*, 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); *Jackson v. Statler Foundation*, *supra*, 496 F.2d at 629; *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *Wagner v. Sheltz*, 471 F. Supp. 903 (D. Conn. 1979); *Sament v. Hahnemann Medical College and Hospital of Philadelphia*, 413 F. Supp. 434 (E.D. Pa. 1976), *aff'd*, 547 F.2d 1164 (3d Cir. 1977); *Pitts v. Dept. of Revenue*, 333 F. Supp. 662, 668 (E.D. Wis. 1971) (three-judge court).

test,[50] its decisions reflect a special solicitude for constitutional claims based on racial discrimination.[51] Given the special status of racial discrimination in state-action analysis, a holding that the government could not lawfully grant preferred tax status to organizations that discriminate on the basis of race should not control the question whether tax exemptions are constitutionally significant for other purposes. That question should be expressly reserved for future decision.

Furthermore, a holding that the government cannot constitutionally grant tax exemptions to organizations that discriminate on the basis of race need not mean that exempt organizations themselves are subject to the same constitutional and legal constraints as the government. Such a holding—that the government would act unconstitutionally if it granted the exemption—does not resolve the wholly separate question whether exempt organizations themselves are engaged in governmental action. Moreover, to treat exempt organizations as the

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[50] *See Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 373-74 (Marshall, J., dissenting).

[51] *Compare Gilmore v. City of Montgomery, supra* (city may not permit exclusive access to municipal recreation facilities by segregated private schools); *Norwood v. Harrison, supra* (textbook lending program held unconstitutional when it benefited racially discriminatory private schools); *Burton v. Wilmington Parking Authority, supra* (racially discriminatory policies of private restaurant operated on municipal premises held unconstitutional); *Shelley v. Kraemer, supra* (state court enforcement of private racially restrictive covenants held unconstitutional), *with Everson v. Board of Education*, 330 U.S. 1 (1947) (state reimbursement of cost of transporting students to private parochial schools upheld); *Board of Education v. Allen*, 392 U.S. 236 (1968) (state program of lending textbooks to parochial school students upheld); *Jackson v. Metropolitan Edison Co., supra* (attempt to impose due process obligations on utility based on state regulation of the utility rejected); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (due process claim based on state UCC provision authorizing sale of goods by secured creditor rejected).

government itself would threaten "traditional values of decentralization, self-reliance, private endeavor, and personal association." [52] As Judge Friendly has pointed out,

> "A holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination. The foundation might be exposed to damage claims for prior discriminatory conduct and could be required by a court to make decisions not only as to the disposition of its charitable donations but in the selection of its employees in accordance with the restrictions properly imposed on governmental agencies. Indeed, it might not be able to escape the mark of government action even by disclaiming future tax benefits; the courts might hold that years of tax benefits had rendered the foundation's status as an agent of the state irrevocable . . . ." [53]

In light of these dangers, courts have been less willing to find a constitutional violation in suits seeking to enjoin private activity than in suits directed at governmental encouragement of that activity.[54] One court has noted this distinction explicitly:

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[52] *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1190 n.8 (D. Conn. 1974) (three-judge court) (complaint dismissed as moot because of intervening change in defendants' racially discriminatory membership policies). *See Wahba v. New York University*, 492 F.2d 96, 102 (2d Cir.) *cert. denied*, 419 U.S. 874 (1974) (recognizing the "value of preserving a private sector free from the constitutional requirements applicable to government institutions"). IS is devoted to fostering this healthy pluralism.

[53] *Jackson v. Statler Foundation, supra*, 496 F.2d at 637 (Friendly, J., dissenting from denial of rehearing *en banc*).

[54] *Compare Falkenstein v. Department of Revenue*, 350 F. Supp. 887 (D. Ore. 1972) (three-judge court), *appeal dismissed for want of jurisdiction*, 409 U.S. 1099 (1973) (state tax exemptions for racially exclusive fraternal organizations enjoined); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court) (fed-

> "[A claim] that some form of state assistance has led to significant state involvement in and 'encouragement' of the private discrimination . . . may well succeed upon a showing of less state involvement than would be required to constitute the state-assisted entity as an agent of the state and hence itself directly subject to Fourteenth Amendment limitations." [55]

Thus, if granting tax exemptions to racially discriminatory organizations amounts to impermissible governmental encouragement of private discrimination, as may be the case, an entity's exempt status need not require it to be treated as an agent of the government. This Court should point out that limitation if it reaches the state-action question.

In sum, if this Court finds it necessary to decide the constitutionality of tax exemptions for schools that discriminate on the basis of race, it should tread carefully. A broad holding that tax exemptions are governmental action for constitutional purposes could leave exempt organizations vulnerable to legal challenges on a variety of theories having nothing to do with racial discrimination. That result would be contrary to the public interest in

---

eral tax exemptions for racially exclusive fraternal organizations held unconstitutional); *Pitts v. Dept. of Revenue*, *supra*, 333 F. Supp. at 666 (state tax exemptions for racially discriminatory organizations enjoined), *with New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (sex discrimination by exempt organizations held not state action); *Junior Chamber of Commerce v. United States Jaycees*, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974) (same); *Stearns v. Veterans of Foreign Wars*, 394 F. Supp. 138 (D.D.C. 1975) (three-judge court), *cert. denied*, 429 U.S. 822 (1976) (sex discrimination by congressionally chartered organization held not state action).

[55] *Cornelius v. Benevolent Protective Order of Elks*, *supra*, 382 F. Supp. at 1189. *See* Brown, *State Action Analysis of Tax Expenditures*, 11 Harv. C.R.-C.L. L. Rev. 97, 119 (1976); Comment, *The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 Iowa L. Rev. 258, 266 (1979).

encouraging philanthropic activity, and the Court should seek to avoid it by circumscribing any governmental-action holding narrowly and restricting it to discrimination on the basis of race.

CONCLUSION

For these reasons, Independent Sector respectfully requests the Court to affirm the decisions below.

Respectfully submitted,

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August 25, 1982

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Appendix

APPENDIX

INDEPENDENT SECTOR VOTING MEMBERS
(as of August 16, 1982)

Aetna Life and Casualty Company
African Wildlife Leadership Foundation, Inc.
Agudath Israel of America
Aid Association for Lutherans
Alcoa Foundation
Alliance to Save Energy
American Arts Alliance
American Assembly
American Association for the Advancement of Science
American Association for Higher Education
American Association of Fund-Raising Counsel, Inc.
American Association of Homes for the Aging
American Association of Museums
American Association of University Women
American Cancer Society
American Citizens Concerned for Life
American Council for the Arts
American Council of Voluntary Agencies for Foreign Service
American Diabetes Association
American Enterprise Institute for Public Policy Research
American Express Foundation
American Farmland Trust
American Heart Association
American Hospital Association
American Kidney Fund
American Lung Association
American Protestant Hospital Association
American Red Cross
American Social Health Association
American Standard Foundation
American Symphony Orchestra League
American Telephone and Telegraph

American Theatre Association
Appalachian Mountain Club
Armco Foundation
Arrow, Inc.
Aspira of America, Inc.
Association for International Practical Training
Association for Volunteer Administration
Association of Art Museum Directors
Association of Black Foundation Executives, Inc.
Association of College, University and
Community Arts Administrators, Inc.
Association of Governing Boards of
Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Junior Leagues, Inc.
Association of Science Technology Centers
Association of Voluntary Action Scholars
Association of Volunteer Bureaus
Atlantic Richfield Foundation
Avon Products, Inc.

Mary Reynolds Babcock Foundation
BankAmerica Foundation
Bankers Trust Company
Bethlehem Steel Corporation
Blue Cross & Blue Shield Associations
Borden Foundation
Bread for the World Educational Fund, Inc.
Bristol-Myers Company
Brookings Institution
Business and Professional Women's Foundation
Business Committee for the Arts, Inc.

California Community Foundation
Call for Action, Inc.
Camp Fire, Inc.
Carnegie Corporation of New York
Carter Hawley Hale Stores, Inc.

Catalyst
Caterpillar Foundation
CBS Inc.
Center for Citizenship Education
Center for Corporate Public Involvement
Center for Responsive Governance
Champion International
Chase Manhattan Bank, N.A.
Chemical Bank
Chevron U.S.A., Inc.
Children's Aid International
Citibank, N.A.
Citizen's Scholarship Foundation of America, Inc.
Cleveland Foundation
Close Up Foundation
Coca-Cola Company
CODEL, Inc.
College Board
Colt Industries Inc.
Columbus Foundation
Committee for Corporate Support of
Private Universities, Inc.
Committee to Combat Huntington's Disease, Inc.
Commonwealth Fund
Connecticut General Insurance Corporation
Conoco, Inc.
Conservation Foundation
Consolidated Natural Gas Company
Consortium for International Citizen Exchange
Continental Bank Foundation
Continental Group Foundation, Inc.
Corning Glass Works Foundation
Council for the Advancement and Support of Education
Council for the Advancement of Small Colleges
Council for American Private Education
Council for Financial Aid to Education
Council of Better Business Bureau/Philanthropic
Advisory Service Division

Council of Engineering and Scientific Society Executives
Council of Jewish Federations
Council on Foundations
CPC International, Inc.
Crown Zellerbach Foundation
Crum and Forster Foundation
Cummins Engine Company, Inc.
Charles A. Dana Foundation, Inc.

Dart & Kraft Inc.
Dayton Hudson Corporation
Deere and Company
Geraldine R. Dodge Foundation
Gaylord Donnelley Foundation
Dresser Industries, Inc.
Drown Foundation
Duke Endowment
E.I. duPont de Nemours and Company
Durfee Foundation
Dyson Foundation

Eastman Kodak Company
Eaton Corporation
Educational Testing Service
Energy Conservation Coalition
Environmental Law Institute
Epilepsy Foundation of America
Equitable Life Assurance Society of the United States
Esmark, Inc. Foundation
Evangelical Council for Financial Accountability
Exxon Corporation

Family Service Association of America
Fireman's Fund Insurance Company Foundation
Fluor Corporation
Ford Foundation
Ford Motor Company Fund
Foremost-McKesson Foundation, Inc.

Foundation Center
Foundation for Children with Learning Disabilities
Foundation for Teaching Economics
Fresh Air Fund

Gannett Foundation
General Conference of Seventh-day Adventists
General Electric Company
General Mills Foundation
General Motors Foundation
Girl Scouts of the U.S.A.
Girls Clubs of America, Inc.
Morris Goldseker Foundation of Maryland, Inc.
Goodwill Industries of America
Grace Foundation, Inc.
William T. Grant Foundation
Grotto Foundation
Gulf Oil Corporation
Gulf & Western Foundation
George Gund Foundation

Miriam and Peter Haas Fund
Walter and Elise Haas Fund
Hallmark Cards, Inc.
Hawaiian Foundation
Edward W. Hazen Foundation
H.J. Heinz Company Foundation
Heublein Foundation, Inc.
William and Flora Hewlett Foundation
Hewlett-Packard Company Foundation
Hoffman-LaRoche Foundation
Hogg Foundation for Mental Health
Hospital Research and Educational Trust
Hunt Foundation

IBM Corporation
Independent College Funds of America, Inc.
Independent Research Libraries Association
Inland Steel-Ryerson Foundation, Inc.

Institute for Journalism Education
International Service Agencies
International Telephone and Telegraph
International Women's Health Coalition
Interracial Council for Business Opportunity

James Irvine Foundation
Irving Trust Company
Ittleson Foundation
Jerome Foundation
JWB
Robert Wood Johnson Foundation
Johnson & Johnson
Joint Action in Community Service
Joint Center for Political Studies
Jostens Foundation, Inc.
Joyce Foundation

Henry J. Kaiser Family Foundation
W.K. Kellogg Foundation
Charles F. Kettering Foundation
Esther A. and Joseph Klingenstein Fund, Inc.
Samuel H. Kress Foundation
Albert Kunstadter Family Foundation

LEAD Program in Business, Inc.
League of Women Voters Education Fund
Leukemia Society of America, Inc.
Levi Strauss Foundation
Lilly Endowment, Inc.
Henry Luce Foundation
Lutheran Council in the U.S.A.
Lutheran Resources Commission—Washington
Lyndhurst Foundation

J. Roderick MacArthur Foundation
John D. and Catherine T. MacArthur Foundation
March of Dimes Birth Defects Foundation
John and Mary R. Markle Foundation

May Department Stores Company
Louis B. Mayer Foundation
Robert R. McCormick Charitable Trust
McDonald's Corporation
McGraw-Hill Foundation
Merek Company Foundation
Joyce Mertz-Gilmore Foundation
Metropolitan Life Foundation
Mexican-American Legal Defense and Education Fund
Eugene and Agnes E. Meyer Foundation
John Milton Society for the Blind
Minneapolis Foundation
Mobil Oil Corporation
Monsanto Company
Charles Stewart Mott Foundation
Stewart R. Mott Charitable Trust
Mutual Benefit Life

National Alliance for the Mentally Ill
National Alliance for Optional Parenthood
National Alliance of Business
National American Indian Court Judges Association
National Amyotrophic Lateral Sclerosis Foundation, Inc.
National Assembly of Community Arts Agencies
National Assembly of National Voluntary Health and Social Welfare Organizations, Inc.
National Assembly of State Arts Agencies
National Association for Bilingual Education
National Association for Hospital Development
National Association of Independent Colleges and Universities
National Association of Schools of Art
National Association of Schools of Music
National Association of Social Workers
National Audubon Society
National Black Media Coalition
National Black Programming Consortium, Inc.
National Board of Young Men's Christian Associations

National Board of the Young Women's Christian Association of the U.S.A.
National Catholic Development Conference, Inc.
National Center for a Barrier Free Environment
National Coalition of Hispanic Mental Health and Human Services Organizations (COSSMHC)
National Committee for Citizens in Education
National Committee for the Prevention of Child Abuse
National Concilio of America
National Conference of Catholic Charities
National Congress of American Indians
National Corporate Fund for Dance
National Council Boy Scouts of America
National Council for Children and Television
National Council of La Raza
National Council of the Churches of Christ in the U.S.A.
National Council of Women of the United States, Inc.
National Council on Alcoholism
National Easter Seal Society, Inc.
National Executive Service Corps
National Federation of State Humanities Councils
National Fund for Medical Education
National Future Farmers of America, Inc.
National Health Council, Inc.
National Hispanic Scholarship Fund
National Hospice Organization
National Image, Inc.
National Information Bureau, Inc.
National Legal Aid and Defender Association
National Medical Fellowships, Inc.
National Mental Health Association
National Park Foundation
National Parks and Conservation Association
National Puerto Rican Coalition
National Puerto Rican Forum, Inc.
National Retired Teachers Association—American Association of Retired Persons (NRTA-AARP)
National School Volunteer Program, Inc.

National Society for Autistic Children
National Society of Fund Raising Executives
National Society to Prevent Blindness
National Tribal Chairmen's Association
National Trust for Historic Preservation
National Urban Coalition
National Urban Fellows, Inc.
National Urban League, Inc.
National Wildlife Federation
National Youth Work Alliance, Inc.
Native American Rights Fund
Natomas Company
Nature Conservancy
Neighborhood Coalition
New England Mutual Life Insurance Company
New World Foundation
New York Community Trust
New York Life Foundation
New York Times Company Foundation, Inc.
NL Industries Foundation, Inc.
Nordson Foundation
Northwest Area Foundation

Olin Corporation
Opera America
Ophthalmic Research Foundation
Oxfam America, Inc.
Owens-Illinois, Inc.

Parents Anonymous
Parents Without Partners
Partners for Livable Places
J.C. Penney Company, Inc.
Pepsico Foundation, Inc.
Permanent Charities Committee of the
Entertainment Industries
Permanent Charity Fund of Boston
Pfizer Foundation, Inc.

Philip Morris, Inc.
Phillips Petroleum Company
Piton Foundation
Planned Parenthood Federation of America, Inc.
Polaroid Foundation, Inc.
Population Crisis Committee/Draper Fund
Population Resource Center
Premier Industrial Foundation
Private Agencies in International Development
Proctor and Gamble Fund
Project Orbis, Inc.
Prudential Foundation
Puerto Rican Legal Defense & Education Fund, Inc.

RCA Corporation
Reader's Digest Association, Inc.
Reading is Fundamental, Inc.
Reinberger Foundation
Republic Steel Corporation
Charles H. Revson Foundation
R.J. Reynolds Industries, Inc.
Rockefeller Brothers Fund
Rockefeller Family Fund
Rockefeller Foundation
Rockwell International Corporation Trust
Rosenberg Foundation

Samuel Rubin Foundation
Safeco Insurance Companies
Russell Sage Foundation
Saint Paul Foundation
Salvation Army
San Francisco Foundation
Save the Children
Schering-Plough Corporation
Dr. Scholl Foundation
Shell Companies Foundation, Inc.
Sherwin-Williams Company

Lois and Samuel Silberman Fund
Alfred P. Sloan Foundation
Spencer Foundation
Spring Hill Center
Standard Oil Company (Ohio)
W. Clement and Jessie V. Stone Foundation
Student Conservation Association, Inc.
Sun Company, Inc.
Support Center
Syntex (U.S.A.), Inc.

Taconic Foundation, Inc.
Tandy Corporation
Teachers Insurance and Annuity Association of America/College Retirement Equities Fund (TIAA-CREF)
Telecommunications Cooperative Network
Texaco, Inc.
Textron, Inc.
3M Company
Time Inc.
Times Mirror Foundation
Tosco Corporation
Transamerica Corporation
Travelers Insurance Companies
Trebor Foundation
Trilateral Commission
Trout Unlimited
Trust for Public Land
TRW, Inc.

Union Carbide Corporation
Union of Independent Colleges of Art
Union Pacific Foundation
United Jewish Appeal
United Negro College Fund
United Parcel Service of America, Inc.
United States Catholic Conference

United States Olympic Committee
United States Steel Foundation, Inc.
United Way of America
Urban Institute
Urban Investment and Development Company

van Ameringen Foundation
VOLUNTEER: The National Center for Citizen Involvement
Volunteers of America

Izaak Walton League of America
Eloise and Richard Webber Foundation
Weingart Foundation
Westinghouse Electric Corporation
Weyerhaeuser Foundation
Women and Foundations/Corporate Philanthropy
Women in Community Service, Inc.
Women's Action Alliance, Inc.
World Crafts Council
World Neighbors

Xerox Corporation

Amicus Brief

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MOTION FILED

AUG 25 1982

Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BOB JONES UNIVERSITY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ Of Certiorari To the United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

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IN THE
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Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION TO FILE
BRIEF AMICUS CURIAE OF THE
INTERNATIONAL HUMAN RIGHTS LAW GROUP
IN SUPPORT OF THE JUDGMENTS BELOW

The International Human Rights Law Group moves this Court, pursuant to Rule 36.3 for leave to file the attached brief amicus curiae.

Amicus seeks to argue in support of the judgment below in these cases, the position of the respondent before the Court of Appeals for the Fourth Circuit and before this Court on the petitions for certiorari. Upon receipt of respondent's brief arguing that the decisions below were wrongly decided, this Court invited William T. Coleman, Jr., Esquire, of Washington, D.C. to brief and argue these cases, as amicus curiae, in support of the judgments below. Amicus has been informed by the Clerk of this Court that briefs of

amici urging affirmance of the judgments below will be considered timely until Mr. Coleman files his brief with this Court. Amicus believes Mr. Coleman has not filed as of the date of this motion and therefore asks this Court to deem this motion and the accompanying brief to have been timely submitted to the Court within Rule 36.

Amicus, a non-profit public interest law office, established in Washington, D.C. in 1978 by the Procedural Aspects of International Law Institute and supported by foundation grants, seeks to promote respect for and adherence to human rights norms in all nations, including the United States.

Amicus wishes to submit to this Court argument that Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code

should not be interpreted to violate a peremptory norm of international law: the prohibition against state supported racial discrimination. This norm has sources in international agreements, customary law, and practice common to the world's major legal systems. An interpretation of Sections 501(c)(3) and 170(c)(2) which would require that tax exempt status be granted to schools which practice racial discrimination would be in violation of this norm, a conflict which should be avoided if possible.

Amicus further argues that the international prohibition against state support for racial discrimination informs the public policy of the United States. As Congress intended that tax exempt status not be provided organizations which

frustrate this public policy such status was properly refused Petitioners.

Amicus is not aware of any presentation of these arguments to this Court in this case and thus respectfully moves this Court, pursuant to Rule 36.3, for leave to file the accompanying brief amicus curiae. The Solicitor General, counsel to the respondent, has consented to the filing of this brief. Amicus sought the consent of counsel for each petitioner, Bob Jones University and

Goldsboro Christian Schools, and they declined to provide their consent.

Respectfully submitted,

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Dated: 25 August 1982

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-Article 2 29
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Nos. 81-1 and 81-3

GOLDSBORO CHRISTIAN SCHOOLS, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

BOB JONES UNIVERSITY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE
INTERNATIONAL HUMAN RIGHTS LAW GROUP
IN SUPPORT OF THE JUDGMENTS BELOW

INTEREST OF AMICUS

The International Human Rights Law Group is a nonprofit legal organization which seeks to promote the observance of international human rights norms. Founded in 1978 by the Procedural Aspects of International Law Institute, a nongovernmental organization of international lawyers and scholars which has consultative status with the United Nations (ECOSOC), the Law Group provides legal assistance and information in the field of international human rights law. With the assistance of attorneys who contribute their services to the Law Group, this expertise is offered on a pro bono basis

to individuals and groups concerned with respect for human rights.

Over the past several years, the International Human Rights Law Group has developed a special interest in states compliance with international norms prohibiting discrimination against ethnic and racial groups. The Law Group has represented before international forums Haitians seeking asylum in the United States, Hungarians in Rumania, Koreans in Japan and Tamils in Sri Lanka, whose rights, articulated in international agreements, have been abridged by government policy or practice. In many instances, governments have modified their treatment of minority groups to conform to international standards. In United States courts as well, the Law Group has participated as amicus in recent cases urging

U.S. compliance with international human rights norms. These cases have held that human rights standards may guide the interpretation of our Constitution to comply with international norms.

The International Human Rights Law Group, interested in securing United States compliance with international human rights norms, believes the image of the United States, as a nation committed to human rights, would be severely damaged in the eyes of the international community if the decisions below were reversed.

SUMMARY OF ARGUMENT

The International Human Rights Law Group, as amicus curiae, supports the judgments of the Fourth Circuit Court of Appeals in these cases. An interpretation of Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code, which would require that tax-exempt status be granted to schools with racially discriminatory practices, would violate a peremptory norm of international law, the prohibition against state sponsored racial discrimination, affirmed in international agreements, customary law, and common to the world's major legal systems. As international law and federal law are afforded parity in our courts under the Supremacy Clause, Art. VI of the U.S. Constitution, this Court should construe the statutes at issue to be consonant with

international law, if it is possible to do so. Additionally, the international prohibition against state support for racial discrimination informs the public policy of the United States; as Congress intended that tax exemptions not be granted to organizations which frustrate this public policy, such exemptions were properly refused petitioners.

ARGUMENT

I. STATE SUPPORT FOR SCHOOLS WHICH DISCRIMINATE ON THE BASIS OF RACE IS IN VIOLATION OF INTERNATIONAL LAW

An interpretation of Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code requiring that tax-exempt status and eligibility for receipt of tax deductable contributions be granted to schools which practice racial discrimination would provide these schools with tangible and necessary support,*/

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*/ Bob Jones admits that "as a result" of the withdrawing of its exemption the school "experienced a decrease in the giving." Joint Appendix in No. 81-3, at 250. Deductibility has been shown to play a "significant role" in the decision of many wealthy persons to contribute. Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 Harv. L. Rev. 378, 387 n. 50 (1979) (citing

(Continued)

encouraging their growth and proliferation, and the resulting drain of white children from the nation's public schools.*/ Employment of limited societal resources to support and sponsor such

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studies). Clearly money that is donated to tax-exempt schools is used to operate these schools. See Tax-Exempt Status of Private Schools: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong, 1st Sess. 400 (1979) (hereinafter "Hearings") (statement of John Esty, Jr., President, National Association of Independent Schools) (tax-exemption and deductibility of donations account for "23% of the operating budgets of our boarding schools and 11% in our day schools.").

*/ The United States Commission on Civil Rights estimates that 3500 private schools were created or significantly expanded as a result of desegregation of the public schools. See, Hearings, supra, 479 (statement of E. Richard Larson, on behalf of the American Civil Liberities Union).

schools would violate a peremptory norm of international law--the prohibition against state sponsored racial discrimination. See part II, infra.

A. THE INTERNAL REVENUE CODE MUST BE INTERPRETED TO BE CONSISTENT WITH INTERNATIONAL LAW

"[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains ..." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 118 (1804) (Marshall, C.J.). (quoted in Lauritzen v. Larsen, 354 U.S. 571, 578 [1953].) See also Cook v. United States, 288 U.S. 102 (1933) (construing statute to avoid violation of international obligation). This principle of interpretation is influenced by the parity given federal and international law in U.S. courts under

the Supremacy Clause, U.S. Const., Art. VI. Head Money Cases, 112 U.S. 580 (1884). The peremptory norm of international law prohibiting state sponsored racial discrimination must inform this Court's interpretation of the federal statutes at issue here as it is "fairly possible" to do so. Cf. Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

B. INTERNATIONAL LAW INFORMS THE PUBLIC POLICY OF THE UNITED STATES WHICH PROHIBITS TAX EXEMPTIONS TO SCHOOLS WHICH DISCRIMINATE ON THE BASIS OF RACE

It is a "general and well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy."

Green v. Connally, 330 F. Supp. 1150, 1161 (D.D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971). "The legislative history of Section 501(c)(3) verifies the exemption's foundation in public policy." Bob Jones University v. United States, 639 F.2d 147, 151 (4th Cir. 1980) (citing leg. history). See Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33 (1958). Judge Leventhal, in Green v. Connally, supra, noted that "[t]he sources and evidences of [the] . . . Federal public policy [against government support for racial discrimination] are various." Id., at 1163.

These sources must now include international human rights law and its peremptory prohibition against state support for racial discrimination. The United States is party to the Charters of

the United Nations and the Organization of American States, and is bound by the human rights provisions in both those instruments (see part II. A. infra). It was an active participant in the drafting of, is signatory to all, and is a party to some principal human rights instruments (see part II. B. infra). Its legislation conditions foreign assistance on compliance with "internationally recognized human rights" (see U.S. Legislation Relating Human Rights to U.S. Foreign Policy [2d ed. Lillich 1980]; Cohen, Conditioning U.S. Security Assistance on Human Rights Practices 76 Am. J. Int'l L. 246 [1982]). It has argued to the International Court of Justice:

> [T]he existence of such fundamental rights for all human beings... and the existence of a corresponding duty on the part of

> every State to respect and observe them.

Memorial of the United States, Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), I.C.J. Pleadings 71 (1980). Its most authoritative spokesmen have recognized international human rights norms as binding upon the United States; President Carter told the General Assembly of the United Nations, "All the signatories of the U.N. Charter have pledged themselves to observe and to respect basic human rights." Boyd, Digest of U.S. Practice in International Law 162 (1977). U.S. courts have employed international human rights law to inform the commands of the U.S. Constitution. Rodriguez-Fernandez v. Wilkenson, 654 F.2d 1382, 1388 (10th Cir. 1981).

Certainly this particular norm-the dominant single command of the international law of human rights, to minimize racial discrimination in all its manifestations-must be considered a "source and evidence" of the "public policy" of the United States, here forbiding granting tax-exempt status to schools which discriminate on the basis of race.

II. NON-DISCRIMINATION ON THE BASIS OF RACE IS A PEREMPTORY NORM OF INTERNATIONAL LAW

The United States is bound, as are all states, by the peremptory norm*/ of

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*/ A peremptory norm of international law is a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of adopted May 22, 1969, entered

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international law*/, affirmed in international agreements, customary law, and general principles of law common to the world's major legal systems, which prohibits state support of racial discrimination.

A. INTERNATIONAL AGREEMENTS PROHIBIT STATE SUPPORTED RACIAL DISCRIMINATION

The U.S. is a state party to the Charter of the United Nations (signed June 26, 1945, entered into force Oct. 24, 1945, 59 Stat. 1031, T.S.N. 993, 3 Bevans 1153) which proclaims as among its

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*/ See Statute of the International Court of Justice, Article 38(1) (defining "sources" of international law) Cf. Filartiga v. Pena, 630 F.2d 876 882-85 (2d Cir. 1980), Restatement of Foreign Affairs Law § 701, Reporters' Note (with special regard to sources of international human rights law) (Tent. Draft No. 3, 1982).

purposes promoting and encouraging respect for human rights "without distinction as to race . . .." Art. 1(3); the Charter further expresses this proscription in Articles 13(1)(b) (functions of the General Assembly); 55(c) (creation of conditions for stability and well-being); and 76(c) (objectives of trusteeship system). The Universal Declaration of Human Rights (signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 [1948]), articulating the human rights obligations of member states, extends its protections "without distinction of any kind, such as race, color ...", Art. 2; See also Articles 7 (equal protection before the law); 16 (right to marry and have a family); and 26(2) (education to foster racial tolerance).

The United States is also a member of the Organization of American States, the Charter of which "proclaim[s] the fundamental rights of the individual without distinction as to race..." (entered into force Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847) Art. 3(j); also specifically guaranteeing non-discrimination on grounds of race are Articles 43(a) (assuring "dignity" and "equality of opportunity") and 112 (establishing the Inter-American Commission on Human Rights)*/; see also American

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*/ Other international agreements specifically prohibiting discrimination on grounds of race, to which the U.S. is party, are:

Slavery Convention, signed Sept. 25, 1928, entered into force Mar. 9, 1927, 46 Stat. 2183, T.S. No. 778,

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Declaration of the Rights and Duties of Man (signed May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, doc. 21, rev. 6 [English 1979]), Article 2.

B. CUSTOMARY LAW PROHIBITS STATE SUPPORTED RACIAL DISCRIMINATION

International agreements to which the U.S. is not party may create equally authoritative customary law. See North Sea Continental Shelf Cases [1969] I.C.J. 37; Filartiga v. Pena, supra. As racial discrimination is prohibited by numerous

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60 L. N.T.S. 253 (entered into force for U.S. Mar. 21, 1929);

Protocol Relating to the Status of Refugees, signed Jan. 21, 1967, entered into force Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for U.S. Nov. 1, 1968);

Convention Relating to the Status of Refugees, opened for signature July 28, 1951, entered into force Apr. 2., 1954, 189 U.N.T.S. 137.

international human rights instruments and is in each afforded the most prominent place in the enunication of impermissible grounds of distinction, it has become a customary norm of international law. See Restatement of Foreign Relations Law § 702(k), Comment j; (Tent. Draft No. 3, 1982) ("systematic racial discrimination" a peremptory norm of international law).

The International Covenants on Human Rights,*/ which codify the principles of

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*/ The U.S. is a signatory to the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic, and Cultural Rights, the American Convention on Human Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. As a signatory the U.S. is obliged to refrain from acts which would defeat the object and purpose of these agreements until such time as it clearly renounces its intention to become party to them. See Vienna Convention on the Law of Treaties, supra at 4, Art. 18.
(Continued)

the Universal Declaration in treaty form, explicitly and preeminently prohibit discrimination on grounds of race. The International Covenant on Civil and Political Rights (adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.S. GAOR, Supp. (No, 16) 52, U.S. Doc. A/6316 [1966]) commands

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Other treaties with non-discrimination clauses which the U.S. has signed include:

Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277, Art. 1;

Convention Concerning the Abolition of Forced Labor (ILO No. 105), adopted June 25, 1957, entered into force Jan. 17, 1959, 320 U.N.T.S. 291, Art. 1(e);

Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, opened for signature Dec. 10, 1962, entered into force Dec. 9, 1964, 521 U.N.T.S. 231, Art. 3.

each state party to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, color. . .." Art. 2(1); (See also Article 26 guaranteeing equal protection.) The International Covenant on Economic, Social and Cultural Rights (adopted Dec. 16, 1966, entered into force Jan. 3, 1976, G.A. Res. 2200 (XXI), 21 U.S. GAOR, Supp. (No. 16) 49, U.S. Doc. A/6316 [1966]), similarily prohibits discrimination in the rights which it enunciates, Art.2(2), as does the American Convention on Human Rights, (signed Nov. 22, 1969, entered into force July 18, 1978, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, Doc. 21, rev. 6 [English 1979]), Article 1(1).

Of the many treaties prohibiting discrimination on grounds of race,*/ the

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*/ See, inter alia, Convention Relating to the Status of Stateless Persons, signed Sept. 28, 1954, entered into force June 6, 1960, 360 U.N.T.S. 130, Art. 3;

Convention Concerning Discrimination in Respect of Employment and Occupation (ILO No. 111), adopted June 25, 1958, entered into force June 15, 1960, 362 U.N.T.S. 32, Preamble, Art. 1;

Convention on the Reduction or Statelessness, adopted Aug. 30, 1961, entered into force Dec. 13, 1975, U.N. Doc. A/CONF. 9/15 (1961), Art. 9;

Convention Against Discrimination in Education, adopted Dec. 14, 1961, entered into force May 22, 1962, 429 U.N.T.S. 93, passim (see infra);

Convention Concerning Employment Policy (ILO No. 122), adopted July 9, 1964, entered into force July 15, 1966, 569 U.N.T.S. 65, Preamble, Art. 1(2)(c);

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted Nov. 26, 1968, entered into

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International Convention on the Elimination of All Forms of Racial Discrimination (adopted Dec. 21, 1965, entered into force Jan. 4, 1969, 660 U.N.T.S. 195) represents "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races." E. Schwelb and N. Nathanson, The United States and the United Nations Treaty on Racial Discrimination (American

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force (No. 11, 1970 G.A. Res. 2391 (XXIII), 23 U.N. GAOR, Supp. (No. 18) 40, U.N. Doc. A/7218 (1968), passim;

International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, entered into force July 18, 1976, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No. 30) 166 U.N. Doc. A/9030 (1974), passim;

Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, G.A. Res. 34,180, U.N. Doc. A/RES/34/180 (1980), 19 International Legal Materials 33 (1980), Preamble.

Society of International Law Studies in Transnational Legal Policy No. 9, 1975), at 5. As the Convention has been ratified by more nations than any other human rights instrument (111 as of January 1, 1982) it is "considered today as declaratory of generally accepted principles of international law . . .." N. Lerner, The U.N. Convention on the Elimination of All Forms of Racial Discrimination, p. VII (2d ed. 1980). Generally, the Convention defines racial discrimination, catalogs those areas in which distinctions based on race are impermissible, and affirmatively requires States to take measures to eradicate such distinctions. The Convention extends its ban on official discriminatory actions to all acts of government; contracting states undertake to:

> engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation..., not to sponsor defend, or support racial discrimination by any persons or organizations..., [and finally] to take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Art. 2(1)(d-e). States are further obligated not to "permit public authorities or public institutions, national or local, to promote or incite racial discrimination." Article 4(c).*/

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*/ The Convention on Racial Discrimination specifically

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The customary law forbidding state

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prohibits discrimination in education at Article 5(d)(v). The right to education enunciated in the International Covenant on Economic, Social and Cultural Rights and the OAS Charter and the American Convention on Human Rights are subject to the general nondiscrimination clauses of those documents.

Additionally, the Convention Against Discrimination in Education, adopted by the United Nations Educational, Scientific and Cultural Organization, ratified by 69 countries(as of January 1, 1982) requires States Parties to "eliminate and present" . . . . "any distinction, exclusion, limitation, or preference, which, being based on race, color...or birth, has the purpose or effect of nullifying or impairing equality of treatment in education." Arts. 1,3. Specifically States Parties are required:

> To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
>
> To ensure, by legislation where necessary that there

(Continued)

supported racial discrimination is further evidenced by strong and frequent expressions of various United Nations bodies on the topic.*/ The numerous General

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> is no discrimination in the admission of pupils to educational institutions: [and],
>
> Not to allow, in any form of assistance granted by the public authorities in educational institutions, any restrictions or preference based solely on the grounds that pupils belong to a particular group . . . Art. 3 (a,b,d)

*/ For example, the Program for the Decade for Action of Combat Racism and Racial Discrimination launched by the General Assembly in 1979 declared that:

> discrimination between human beings on the ground of race, colour or ethnic origin is an affront to humanity and shall be condemned as a violation of the principles of the Charter of the United Nations . . . as an

(Continued)

Assembly and Security Council resolutions condemning apartheid are marked by "a recurrent, emphatic, and equally general condemnation of racial discrimination as unlawful under international law" McDougal, Lasswell, and Chen, Human Rights and World Public Order 598 (1980).

Customary law is also found in the commitments of states members of regional intergovernmental organizations to guarantee racial equality. See Organization of American States Charter, American Convention on Human Rights supra; Banjul Charter on Human and Peoples' Rights (adopted June 20, 1981 by the Organization of African Unity Council of Ministers Thirty-Seventh Ordinary Session, held at

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obstacle to friendly and peaceful relations among nations and as a factor capable of disturbing peace and security among

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Nairobi, O.A.U. Doc. CAB/LEG/67/3, rev. 5), Preamble, Art. 2, Art. 12(5); the European Convention for the Protection of Human Rights and Fundamental Freedom (signed Nov. 4, 1950, entered into force Sept. 3, 1953, 212 U.N.T.S. 222), Art. 14.

Recognizing this practice of nations, the International Court of Justice has determined that discrimination on grounds of race violates international law, concluding that "the principles and rules concerning the basic rights of the human person, including protection from... racial discrimination," constitute an international obligation of all states. Case Concerning The Barcelona Traction Light and Power Co., Ltd., [1970] I.C.J.

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peoples.

E.S.C. Res. 3057, 20 U.N. ESCOR, Supp. (No. 30) 70, Annex at 1, U.N. Coc. A/9030 (1973).

32; "[T]o establish... and to enforce distinctions, exclusion, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin.... constitutes a denial of fundamental human rights" and "is a flagrant violation of the purposes and principles of the Charter." Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, [1971], I.C.J. 57.

C. THE WORLD'S MAJOR LEGAL SYSTEMS PROHIBIT RACIAL DISCRIMINATION

Non-discrimination on the basis of race is now common to the world's major legal systems as well. The Special Rapporteur on Racial Discrimination of the U.N. Sub-Commission on Prevention of

Discrimination and Protection of Minorities observes

> There is a clear trend to include in constitutional provisions not only guaranteeing equality before the law but specifically providing against racial discrimination...a great majority of States have enacted legislation or taken other measures aimed at preventing or combatting racial discrimination and achieving equal rights for all without distinction H. Santa Cruz, Racial Discrimination 28 (1978) (citing municipal constitutions).

State practice in the United States has been especially influential and international law scholars have noted with pride the influence decisions of this Court have had on the development of international human rights law. See, McDougal, Lasswell, and Chen, at 602 ("the tremendous changes propelled by the Supreme Court in the law

of the United States have carried a message to many parts of the world.") See also, H. Santa Cruz, at 35 (Brown v. Board of Education, 347 U.S. 483 (1954) and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) described as "key precedents" in defining the role of the municipal judiciary in combatting racial discrimination).

CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1981

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

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IN THE

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee has over the past eighteen years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, housing, municipal services, the administration of justice, and law enforcement. Since 1965 the Committee has maintained an office in Jackson, Mississippi with full-time staff attorneys to assist black citizens in that state.

The Lawyers' Committee has long had a strong interest in effective public school desegregation, particularly in Mississippi. For example, it filed a brief *amicus curiae* and its then Co-Chairman (now U.S. District Judge) Louis F. Oberdorfer presented oral argument in support of the petitioners in *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). Following the Court's decision in that case, many new all-white, segregated private schools were established, and existing all-white schools expanded, in Mississippi. These schools provided white students and their parents with an opportunity to avoid public school desegregation and frustrated the efforts of federal courts and the U.S. Department of Health, Education, and Welfare to carry out this Court's *Alexander* mandate. Nevertheless, the Internal Revenue Service considered these private schools' racially discriminatory policies irrelevant to their status as charitable institutions, and the Service recognized all of them as exempt from federal taxation pursuant to 26 U.S.C. § 501(c)(3), thus qualifying third-party gifts to the schools as tax-deductible charitable donations. Accordingly, in 1969 the Committee's Mississippi office filed suit against the Service on behalf of a class of Mississippi black parents and schoolchildren. The Committee has continued to provide counsel to the plaintiffs in that case, in which proceedings are still pending in the U.S. District Court for the District of Columbia, *sub nom. Green v. Regan*, Civ. No. 1355-69.

After the plaintiffs obtained a preliminary injunction in that suit in 1970, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), the Internal Revenue Service announced that it could "no longer justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes."[1] The

[1] Internal Revenue Service News Release, July 10, 1970, 7 STAND. FED. TAX REP. (CCH) ¶ 6790 (1970). The change of policy was then codified in Rev. Proc. 71-447, 1971-2 C.B. 230.

three-judge court nonetheless granted the plaintiffs' request for injunctive relief to assure that the Service effectuated its new policy, which the court held was the only correct interpretation of the Internal Revenue Code. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). Subsequently, the district court has granted further injunctive relief to carry out the 1971 decree. *Green v. Regan*, Civ. No. 1355-69 (D.D.C., May 5 and June 2, 1980).

In their petitions for certiorari and briefs, both Bob Jones University and Goldsboro Christian Schools, Inc. not only raise First Amendment claims with respect to the application of *Green* principles to religious institutions, but they also seek a determination from this Court that *Green* itself was wrongly decided. Such a ruling would directly undercut the judgments which Lawyers' Committee attorneys have secured in *Green*, and it would also seriously weaken anew the desegregation of Mississippi's public schools. Because *amicus* believes that there is no credible argument for an interpretation of the Code which would have this tragic result and, indeed, that the *Green* ruling is constitutionally compelled, we file this brief in support of the United States.[2]

SUMMARY OF ARGUMENT

There are two important issues raised by these cases: whether the federal government can constitutionally confer tax benefits on racially discriminatory private schools; and whether the First Amendment *requires* the federal government to confer those benefits on such schools if their discrimination is religiously based. The first issue was effectively resolved in *Norwood v. Har-*

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[2] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

rison, 413 U.S. 455 (1973), in which a unanimous Court declared it unconstitutional for government to lend "tangible financial aid" to private discriminatory schools. There is no doubt that the tax benefits at issue in these cases constitute such "aid," both as a matter of fact and as a matter of law. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 790-91 (1973); *Green v. Connally*, *supra*.

The First Amendment issue requires a balancing of the public's interest in precluding tax-benefit support to racially discriminatory schools against the right of those schools which discriminate racially on religious grounds not to be unduly penalized for conduct based upon religious belief. Since the government's obligation to preclude the benefits is constitutionally compelled, and is, in addition, premised on a constitutionally rooted national policy against racial discrimination in education; and since the burden on religious exercise in the present case is minimal, the public interest in precluding benefits must prevail.[3]

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[3] The first question which petitioners raise in these cases is whether sections 501(c)(3) and 170(a)-(c) of the Internal Revenue Code are properly read to bar the granting of tax benefits to racially discriminatory private schools. As indicated above, this has been the Service's consistent construction of the Code since 1970. It was upheld in 1971, Green v. Connally, *supra*, and has been followed by every federal court which has considered it since that time. We do not address the question separately in this brief but fully support the government's arguments. Based upon *amicus'* experience, however, we wish to direct the Court's attention to two matters:

The first point we wish to make on the statutory construction issue concerns this Court's ruling in Coit v. Green, 404 U.S. 997 (1971), which this Court has said "lacks the precedential weight of a case involving a truly adversary controversy" since the Service had "reversed its position while the case was on appeal to this

ARGUMENT

I. THE FEDERAL GOVERNMENT IS CONSTITUTIONALLY PROHIBITED FROM GRANTING TAX BENEFITS TO RACIALLY DISCRIMINATORY PRIVATE SCHOOLS.

While we believe the IRS, the *Green* court, and now, the Fourth Circuit in the present cases, have all correctly construed Sections 501 and 170 to authorize the

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Court." Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974). Even though the case may not have been "truly adversary" in the sense that the Service did not, before this Court, oppose the *Green* plaintiffs' construction of the Code, nevertheless, as we will explain, the case was an "adversary" proceeding as to the statutory issue pressed by the present petitioners. Under well-settled principles, the Court's affirmance of *Green* therefore is a holding on the merits of that issue not to be overturned lightly.

Following the issuance of the preliminary injunction, the *Green* three-judge district court permitted certain intervenors to enter the case in January, 1970 as representatives of parents and children who attended or supported private racially discriminatory schools in Mississippi. After the Service changed its position in July, 1970, *see* note 1 *supra* and accompanying text, the only issues which the United States litigated in the lower court in *Green* were the appropriate *procedures* for effectuating the denial of tax benefits to discriminatory schools and the necessity for any injunctive relief. *See* Defendants' Memorandum in Opposition to Plaintiffs' Proposed Injunctive Decree, Green v. Kennedy, Civ. No. 1355-69 (D.D.C., filed Jan. 25, 1971). The intervenors, however, attacked the statutory interpretation proffered by the plaintiffs and the Service, and which was ultimately adopted by the three-judge court. The intervenors were also the parties adversary to the plaintiffs and the United States before this Court in 1971. In their papers, they described the federal questions before this Court as whether the IRS could lawfully withdraw tax benefits from racially discriminatory private schools, and whether such withdrawal violated intervenors' First Amendment rights. Jurisdictional Statement, Coit v. Green, *supra*, at 13-16. In response, both the United States and the plaintiffs moved to dismiss the appeal, primarily on the ground that the intervenors lacked standing to raise these issues. However, the *Green* plaintiffs alternatively asked this Court

withholding of tax benefits from racially discriminatory private schools, the real issue here, in our view, is not

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to affirm the lower court's judgment. Motion to Dismiss or Affirm, Coit v. Green, *supra*. The Court did, in fact, summarily affirm rather than dismiss the appeal. For this reason, *amicus* has always understood this Court's affirmance in *Green* to have rejected intervenors' two contentions on their merits, and to have confirmed the holding (if not necessarily the specific reasoning) of the lower court. Mandel v. Bradley, 432 U.S. 173, 176 (1976); Hicks v. Miranda, 422 U.S. 332, 344 (1975); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring). The fact that the Court treated its *Green* affirmance as both a decision on the merits and a holding of some importance was evident in the holding two years later in Norwood v. Harrison, 413 U.S. 455, 463 & n.6 (1973), discussed in Argument I *infra*.

We are not contending, of course, that the Court may not, upon reconsideration of the *Green* holding, now reverse its previous affirmance of that holding; nor do we suggest that there is not more jurisprudential leeway for such a reversal in the case of a prior summary affirmance. Rather, we mean only to underscore that it is in fact a reversal that is being sought, and that petitioners are now making essentially the same challenges to the same 1970 IRS construction which intervenors made over ten years ago. In such a situation, we submit that the Court should hesitate now to reach a different outcome, *see* McKeesport Area School Dist. v. Pennsylvania Dept. of Educ., 446 U.S. 970, 971-72 (1980) (White, J., concurring). This is especially so in light of Congress' acceptance of the *Green* holding, *see infra*, and the long reliance by the Service, the courts, and the private schools themselves, on the previous affirmance. *Cf.* Runyon v. McCrary, 427 U.S. 160, 190-92 (1976) (Stevens, J., concurring); Flood v. Kuhn, 407 U.S. 258, 273-76, 278-79, 283 (1971); Radovich v. National Football League, 352 U.S. 445, 450-52 (1957).

Second, we believe that congressional action since the Service announced its construction of the Code in 1970 has confirmed and approved that construction. In 1976, the Congress enacted 26 U.S.C. § 501(i) to deny tax-exempt status to discriminatory social clubs. As explained in the Senate Report on the bill, its purpose was to overturn McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), which had held that discriminatory fraternal beneficiary societies were not entitled to such status, but that social clubs were. S. REP. No. 1318, 94th Cong., 2d Sess. 8 n.5 (1976), *reprinted in* [1976] U.S. CODE CONG. & ADM. NEWS 6057. The "reason for change" in

one of statutory authorization; it is one of constitutional command.

The constitutional prohibition of racial discrimination in education was first articulated by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Bolling v. Sharpe*, 347 U.S. 497 (1954) (companion case to *Brown* applying prohibition against state-supported school segregation to the federal government). In *Brown* the Court noted that education is "perhaps the most im-

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the law was that "[i]n view of national policy," it was considered "inappropriate" for a discriminatory "social club or similar organization" to be accorded tax-exempt status. *Id.* at 6058. The Report expressly noted that *McGlotten* had denied tax-exempt status to racially discriminatory fraternal societies and that this Court had affirmed the *Green* decision denying tax benefits to racially discriminatory educational institutions. *Id.* at 6058 n.5. We submit that this legislative history demonstrates (a) Congress' commitment to the national policy against racial discrimination; (b) that the policy must be taken into account in determining eligibility for tax benefits; (c) that Congress stands ready to amend section 501 to overturn judicial decisions at odds with this national policy; and (d) that Congress was aware of, and approved, the decision in *Green*.

These conclusions are further supported by events in 1979, after the Service had published proposed procedures for identifying racially discriminatory private schools not entitled to tax-exempt status. 43 Fed. Reg. 37296 (August 22, 1978); 44 Fed. Reg. 9451 (February 13, 1979). *See Tax-Exempt Status of Private Schools: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 96th Cong., 1st Sess. 5 (1979) (statement of Jerome Kurtz) [hereinafter cited as *"1979 Hearings"*]. Although Congress adopted riders to Treasury Department appropriations acts to prevent the effectuation of the new procedures, *see* P.L. No. 96-74, §§ 103, 615, 93 Stat. 559, 562, 577, it did not suspend the Service's authority under its existing procedures to withhold tax benefits from racially discriminatory private schools. The supporters of the appropriations riders strongly endorsed the *substance* of the Service's 1970 construction of the Code. *See, e.g.*, 125 CONG. REC. H5883 (daily ed., July 13, 1979) (remarks of Rep. Sensenbrenner); *id.* at H5884 (Rep. Hammerschmidt), H5885 (Rep. Dickinson), H5982 (daily ed., July 16, 1979) (remarks of Reps. Dornan, Goldwater, and Miller).

portant function of state and local governments" and, further, that government-sponsored separation of students "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their minds and hearts in a way unlikely ever to be undone." 347 U.S. at 493, 494. The Court also recognized that "[t]he impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group," *id.* at 494 (quoting with approval the findings of the district court in *Brown*).[4] Because the stigma and harm are the same whenever black children are excluded from educational opportunities on the basis of race with governmental sanction,[5] this Court promptly and consistently applied *Brown* to affirm lower court rulings which enjoined programs of state-furnished assistance to "private" schools established to circumvent public school desegregation.[6]

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[4] *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880): the Fourteenth Amendment protects blacks from "unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society . . . ."

[5] In Runyon v. McCrary, *supra*, this Court sustained Congress' authority, in enacting 42 U.S.C. § 1981 to enforce the Thirteenth Amendment, to bar racial discrimination by private schools whether or not the institutions were the recipients of government largesse.

[6] Faubus v. Aaron, 361 U.S. 197 (1959), *aff'g* Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959); Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961); *aff'g* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960); St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962), *aff'g* 197 F. Supp. 649 (E.D. La. 1961); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Wallace v. United States, 389 U.S. 215 (1967); *aff'g* Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967); Louisiana Fin. Assistance Comm'n v. Poindexter, 389 U.S. 571 (1968), *aff'g* 275 F. Supp. 833 (E.D. La. 1967); South Carolina State Bd. of Educ. v. Brown, 393 U.S. 222 (1968); *aff'g* 296 F. Supp. 199 (D.S.C. 1968); *cf.* Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

These developments culminated in the decision in *Norwood v. Harrison*, *supra*, which makes clear that government may not lend "tangible financial aid" to private, racially discriminatory schools, even under a facially neutral program which benefits all private schools. There, the Court reviewed the constitutionality of a Mississippi statute which made free textbooks available to schoolchildren in both public and private schools, without regard to whether the schools were racially discriminatory. On reasoning clearly applicable to the present cases, the Court declared the loaning of textbooks to racially discriminatory schools to be unconstitutional.

"Racial discrimination in state-operated schools," said the Court, "is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" 413 U.S. at 465 (quoting *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-76 (M.D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967)). Hence, said the Court, government may not provide "tangible financial aid" to an educational institution "if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466.

The essential issue in *Norwood*, then, was whether the textbooks amounted to "tangible aid" that had a "significant tendency" to "support" private discrimination in the schools. The Court said they did, noting that textbooks are "not legally distinguishable from the forms of state assistance foreclosed by the prior cases." *Id.* at 463. The "prior cases" relied on were several of the lower court decisions cited in note 6 *supra*, which "[t]his Court has consistently affirmed[,] . . . enjoining state tuition grants to students attending racially discriminatory private schools," *id.*, as well as *Green v. Connally*, *supra*, the very case which prohibited the granting of the tax benefits at issue here.

On the remaining question, whether the provision of the textbook aid had a "significant tendency" to "support private discrimination," the Court concluded that since textbooks are "[a]n inescapable educational cost," and since the state was bearing that cost, "the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the state by tangible aid in the form of textbooks thereby gives support to such discrimination." *Id.* at 464-65.[7]

We do not see how *Norwood* can be read other than to declare unconstitutional the issuance of tax benefits to racially discriminatory schools.

It can hardly be doubted that government benefits made available under Sections 501 and 170 provide "tangible financial aid" to the schools. As this Court explicitly recognized when Bob Jones was last before it, "[R]evocation of a § 501(c)(3) ruling letter and consequent removal from the Cumulative List [approving deductibility of donor contribution under Section 170] is likely to result in serious damage to a charitable organization." *Bob Jones University v. Simon*, 416 U.S. 725, 730 (1974).[8] "Many contributors simply will not

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[7] Significantly, *Norwood* did not require any showing that government aid to private schools interfered with public school desegregation. *See* 413 U.S. at 465-66; *cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978). However, even if *Norwood's* holding were limited to situations in which government aid to segregated private schools followed upon public school desegregation orders, it would apply here. Bob Jones and Goldsboro are both located in or near desegregating school districts. *See* Whittenberg v. Greenville County School Dist., *decided sub nom.* Stanley v. Darlington County School Dist., 424 F.2d 195 (4th Cir. 1970); Smith and United States v. North Carolina State Bd. of Educ., Civ. No. 2572 (E.D.N.C., May 18, 1971) (consent decree providing for desegregation of Goldsboro city schools).

[8] The considerable value of these tax benefits to educational and other charitable institutions is demonstrated in numerous economic studies. *See, e.g.*, J. PERLMAN, FEDERAL TAX POLICY 88 (3d ed. 1977) and Feldstein, *The Income Tax and Charitable Contributions:*

make donations to an organization that does not appear on the Cumulative List." *Id.* Indeed, Bob Jones contended in that case that if it lost its tax exemption it would lose *all* contributions from those who otherwise take charitable deductions. *See id.* at 725 n.2. Consistently, in the present case evidence in the record shows that, barely two weeks after Bob Jones' tax exemption was revoked, "as a result" the school experienced "a decrease in the giving." Joint Appendix in No. 81-3, at 250.

The fact that the tax benefits have consistently been and continue to be of considerable tangible assistance to private schools in general is well-documented. For example, in *Green v. Kennedy, supra*, the court rested its conclusion that federal tax benefits constituted "substantial and significant" government support in part upon the evidence, placed before it by the parties, which was offered in an earlier federal court action involving Mississippi private schools. In the earlier case, *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1387 (S.D. Miss. 1969), a three-judge court invalidated a state law providing tuition grants to students attending private, racially discriminatory schools. The *Coffey* evidence showed that private discriminatory schools had "flourished in the wake of desegregation rulings,"[9] that the schools were operated "on the thinnest financial basis," and that the tax benefits were an important, if not indispensable, factor in the establishment and con-

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Part I—Aggregate and Distributional Effects, 28 NAT'L TAX J. 81, 82 (1975), *cited in* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 387 n.50 (1979).

[9] In this regard, evidence from the IRS demonstrated that while no private school exemptions had been sought by Mississippi schools prior to the state's first desegregation suit (1963), such exemptions were sought and applications were received steadily thereafter as desegregation activity increased. Green v. Kennedy, *supra*, 309 F. Supp. at 1135-36. *See also* note 23 at 23-24 *infra*.

tinued operation of the schools. *Green v. Kennedy, supra,* 309 F. Supp. at 1135.[10]

In addition, the court took special note that officials of the private schools themselves regarded the tax benefits as "psychological help to the school, from the public reaction to what was considered as approval by the Federal Government." *Id.*[11] Moreover, this federal "help" became of even greater importance to the schools after the state tuition grants were eliminated. According to evidence relied upon by the court, solicitations for support from the private schools stressed the loss of the state grants, underscored the deductibility of contributions, and stated that, in the absence of such deductible contributions, many students would be "forced" to return to the public schools. *Id.* at 1135.[12]

Finally, the continuing importance of the tax benefits to private schools was recently stressed by representatives of the schools in congressional hearings.[13]

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[10] For a summary of further evidence concerning the contribution of the tax benefits to southern discriminatory private schools, *see* Spratt, *Federal Tax Exemptions for Private Segregated Schools,* 12 WM. & MARY L. REV. 1, 3-5 (1970).

[11] *See* McGlotten v. Connally, *supra,* 338 F. Supp. at 456, enjoining the Secretary of the Treasury from granting tax exemptions and deductibility of contributions to racially discriminatory fraternal organizations and their donors, in part because by ruling that an organization is "charitable" under 26 U.S.C. § 170 "the government has marked certain organizations as *'Government Approved'* with the result that such organizations may solicit funds from the general public on the basis of that approval"; *see also* note 4 *supra* and accompanying text.

[12] A solicitation letter quoted by the court stated that: "[U]nless we receive substantial contributions to our Scholarship Fund there will be many, many students, whose hands and bodies are just as pure as any of their classmates and playmates . . . who for financial reasons alone, will be forced into one of the intolerable and repugnant 'other schools,' . . . or into dropping out of school entirely . . . ." 309 F. Supp. at 1135.

[13] *E.g., 1979 Hearings* at 555 ("Tax deductible contributions to an independent religious school are critical in keeping tuition with-

Inasmuch as the tax benefits are, thus, of continuing "tangible financial aid" to tax-exempt private schools, and inasmuch as that aid is plainly used to finance various necessary expenses of operating those schools—for example, evidence in *Coffey* and in the cited hearing statements indicates that tax-deductible contributions are used to subsidize students' tuition expenses—the "economic consequence" is, as the Court held in *Norwood*, "to give aid" to those schools. 413 U.S. at 464. And if any such school "engages in discriminatory practices," as the Court also held, the government through the aid necessarily "gives support to such discrimination." *Id.* at 465.

There is no dispute in the present cases that through the federal government's conferral of tax benefits Bob Jones and Goldsboro receive tangible financial aid which is (or would be) used to meet continuing expenses of those schools. Neither do those schools deny that they engage in racially discriminatory practices which would be constitutionally prohibited were they practiced in the public schools.[14] Instead, the two schools argue that the

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in reach . . .") (statement of Paul Kienel, Association of Christian Schools International); *id.* at 388 ("Private schools are heavily dependent on tax-free contributions") (statement of W. Wayne Allen, Chairman of the Board, Briarcrest Baptist School System, Memphis, Tennessee); *id.* at 400 (tax-exemption and deductible gifts are "of vital importance" for independent schools, accounting for "23% of the operating budgets of our boarding schools and 11% in our day schools") (statement of John Esty, Jr., President, National Association of Independent Schools).

[14] Before this Court, Bob Jones has abandoned its claim, urged below, that its anti-miscegenation policies would be permissible if enforced in the public schools. That such policies are racially discriminatory is well settled. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). As this Court said in *Loving*: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S. at 12. The fact that Bob Jones' racial classifications apply to members of *all* races

federal aid supplied to them should not be constitutionally prohibited by *Norwood*, since it amounts to only an "indirect economic benefit" flowing from a "passive" governmental decision not to tax the schools or the schools' contributors. Brief for Bob Jones at 20-21; Brief for Goldsboro at 41-42. The schools' sole support for this claim is this Court's decision in *Walz v. Tax Commission*, 397 U.S. 644 (1970). Petitioners' reliance on that case is altogether misplaced.

The issue in *Walz* was whether granting property tax exemptions to churches violated the Establishment Clause of the First Amendment. Recognizing that the exemptions did, necessarily, "afford an indirect economic benefit" to the churches, *id.* at 664, the Court held that, for purposes of Establishment Clause analysis, that fact in itself was not controlling. Rather, the "judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669. As to the purpose of the exemption, the Court relied on the historic, universally approved tax exemption of churches in this country—an approval that antedated the First Amendment itself—and determined that this long practice was not based on an effort by the state to support religion, but to assure a "benevolent neutrality toward churches and religious exercise generally . . . ." *Id.* at 676-77. Confirming this "neutrality" of purpose was the fact that the tax exemption was provided to various charitable institutions, not solely to churches. *Id.* at 672-73. Regarding the second issue, state "entanglement" with religion, the Court determined that the tax exemption helped reduce rather than increase the risk of such entanglement, since "[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valua-

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does not make them any the less objectionable. Racial classifications that are "even-handed" are nevertheless "repugnant to the Fourteenth Amendment." *Id.* at 12 n.11.

tion of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674.

For at least four separate reasons, the *Walz* decision is of no assistance to petitioners in the present cases.

First, the fact that aid, by way of a tax exemption, to churches is permitted under the Establishment Clause does not mean that a tax exemption (and other important tax benefits) can be granted to racially discriminatory schools consistent with the Equal Protection Clause. Indeed, that is precisely what this Court held in *Norwood*:

> The leeway for indirect aid to sectarian schools [for Establishment Clause purposes] *has no place in defining the permissible scope of state aid to private racially discriminatory schools.* "State support of segregated schools *through any arrangement*, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

Norwood v. Harrison, *supra*, 413 U.S. at 464 n.7 (emphasis supplied).

Second, while neutrality of purpose is the touchstone of Establishment Clause analysis, and although in *Walz* it was important that the tax exemption was afforded to other charitable institutions, a neutral and legitimate governmental purpose will not validate a statute which has the effect of supporting racially discriminatory schools.[15] As the Court said in *Norwood*, 413 U.S. at 466:

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[15] Thus, while a state may, consistent with the Establishment Clause, make textbooks available to private religious schools if its purpose is a "neutral" one, *i.e.*, to make books available to all schoolchildren in public and private schools alike, Board of Educ. v. Allen, 392 U.S. 236 (1968), it cannot make those same books available to private schools that are racially discriminatory, regardless of the "neutrality" of its purpose, Norwood v. Harrison, *supra*, 413 U.S. at 466.

> We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violations of a constitutional duty.

Third, even if neutrality of governmental purpose were more important to a determination of the legitimacy of the tax benefits in the present case than it is, *Walz* does not control the outcome here. As stated above, that decision rested in large measure on the long history of tax exemptions accorded to churches and the "benevolent neutrality" evidenced by that history. But, as the Court has made explicit in cases examining other benefits to sectarian schools, "[w]e have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemptions for churches." *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971). In fact, quite the opposite is true of sectarian schools. "Strong opposition has been evident throughout our history to the use of the state's taxing powers to support private sectarian schools." *Id.* at 642, 653-54 (separate opinion of Brennan, J.). "In sharp contrast to the undeviating acceptance given religious tax exemptions from our earliest days as a Nation, [citing *Walz*], subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed." *Id.* at 645 (Brennan, J.).

Finally, if petitioners mean to argue, relying on *Walz* and the Establishment Clause cases, that tax benefits are not governmental aid at all because they are not a direct payment to the schools, the argument is completely without foundation. As previously discussed, this Court indicated in *Norwood* that for constitutional purposes it considers tuition grants and tax benefits (which are used to stimulate and indirectly pay for, among other things, tuition expenses) to be identical. Moreover, in *Committee for Public Education v. Nyquist*, *supra*, the Estab-

lishment Clause case decided the same day as *Norwood*, the Court made explicit that governmental aid in the form of tax benefits to sectarian schools is *constitutionally indistinguishable* from direct governmental payments made to those schools:

> In practical terms there would appear to be little difference, for purposes of determining whether . . . aid has the effect of advancing religion, between the tax benefit . . . and the tuition grant . . . . "[I]n both instances the money involved represents a charge made upon the state for the purpose of religious education."

413 U.S. at 790-91 (quoting statement of Circuit Judge Hays, dissenting below).

There is therefore no support in *Walz* and the Establishment Clause cases for the view that "indirect" government aid by way of tax benefits can be excused when "direct" aid would be constitutionally prohibited.[16] Indeed, we submit that any other view of such aid would flout the general principle, expressly applied in *Norwood*, that government may not bring about indirectly what it cannot constitutionally bring about directly: "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, *supra*, 413 U.S. at 465.

In sum, we submit that the *Norwood* decision—which has been consistently reaffirmed by this Court[17] and by

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[16] For a further analysis of the constitutional and economic similarity between tax benefits and direct payments, *see* Brown, *State Action Analysis of Tax Expenditures*, 11 HARV. C.R.-C.L. L. REV. 97 (1976); Comment, *Tax Incentives as State Action*, 122 U. PA. L. REV. 414 (1973); *cf.* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970) (Mr. Surrey was Assistant Secretary of the Treasury for Tax Policy from 1961 to 1969).

[17] *See* Gilmore v. City of Montgomery, 417 U.S. 556, 568-69 (1974); Runyon v. McCrary, *supra*, 427 U.S. at 171, 175-77; Maher

the lower courts in circumstances very similar to those presented here [18]—compels the conclusion that the government's conferral of the tax benefits at issue amounts to unconstitutional support of Bob Jones' and Goldboro's discrimination. We urge the Court to say so, unmistakably, in these cases, making clear beyond any doubt whatever that the United States government cannot constitutionally support racially discriminatory practices in the schools of this nation.

II. THE GOVERNMENT'S DECISION NOT TO SUPPORT RACIALLY DISCRIMINATORY PRIVATE SCHOOLS DOES NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS.

Petitioners' final contention is that the government's failure to support their schools with tax benefits violates their rights under the Religion Clauses of the First Amendment. They argue, first, that even if the government's refusal to support racially discriminatory schools is valid as a general rule, an exception to that rule must be made in favor of those schools whose racial discrimination is religiously based; otherwise, say petitioners, those schools' Free Exercise rights would be violated. Second, petitioners argue that failure to make an exception for their religiously based discrimination would violate the Establishment Clause in that religions which do not discriminate would be favored over those that do. Neither

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v. Roe, 432 U.S. 464, 477 (1977); Flagg Bros., Inc. v. Brooks, *supra*, 436 U.S. at 163 (holding that the sovereign-function doctrine did not support a finding that warehouseman's proposed sale of goods in storage was attributable to state and thus "state action" under Fourteenth Amendment, but noting that its holding does not impair the precedential value of cases such as *Norwood* and *Gilmore*).

[18] *See, e.g.*, Brown v. Califano, 627 F.2d 1221, 1235 (D.C. Cir. 1980); Bob Jones University v. United States, 639 F.2d 147, 152-53 (4th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981); Iron Arrow Honor Soc. v. Hufstedler, 499 F. Supp. 496, 505-06 (S.D. Fla. 1980), *aff'd* 652 F.2d 445 (5th Cir. 1981), *pet. for cert. filed*, 50 U.S.L.W. 3377 (Oct. 31, 1981); Grove City College v. Harris, 500 F. Supp. 253, 267-68 (W.D. Pa. 1980).

of these arguments is in accord with the controlling standards announced by this Court. The acceptance of either would compromise the constitutionally rooted national policy against racial discrimination in the country's schools. We treat only the Free Exercise claim here.

Before addressing this contention, however, we make the following two observations about the assumptions underlying petitioners' arguments. If either assumption is in error, then the petitioners' Religion Clause arguments must fail.

First, if petitioners' *Walz* argument—that the tax benefits disputed in this case cannot be deemed tangible government aid for Equal Protection Clause purposes—were correct, then *a fortiori* the withdrawal of the schools' tax-exempt status by the Service involves the loss of such inconsequential assistance as not to trigger Free Exercise or Establishment Clause concerns.[19] As the Court held in *Norwood*, "[h]owever narrow may be the channel of permissible state aid to sectarian schools, it permits *a greater degree of state assistance* than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system," 413 U.S. at 470 (emphasis supplied) (citations omitted). We therefore proceed in this Argument on the basis that the tax benefits at issue here do constitute "tangible government aid" to the schools.

Second, while we are also assuming in this discussion that the withdrawal of benefits was in fact a "penalty" upon petitioners' exercise of a constitutional right, that assumption may not be correct. In *Harris v. McRae*, 448 U.S. 297, 314-17 (1980), the Court distinguished a refusal by government to finance a constitutionally protected activity from a penalty imposed by government upon the activity itself. In *Harris* the Court held that

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[19] *See, e.g.*, O'Hair v. Paine, 312 F. Supp. 434, 437 (W.D. Tex. 1969), *appeal dismissed*, 397 U.S. 531 (1970), *aff'd* 432 F.2d 66 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).

the government could choose to subsidize certain medical services, intentionally excluding abortions, even though the right to an abortion is constitutionally protected.[20] Similarly, the government here has chosen to support only certain charitable institutions, excluding those that are racially discriminatory; the excluded institutions may have a constitutional right to be discriminatory, but they have no constitutional right to receive government support for that discrimination.

We are in general agreement with petitioners concerning the basic elements to be considered in reviewing their claim that the government's refusal to grant them tax benefits has unconstitutionally interfered with their Free Exercise rights: (1) the nature of the burden, if any, which has been placed on their right; (2) the nature of the governmental interest at stake; and (3) an assessment whether, on balance, the governmental interest is sufficiently compelling to justify the particular burden placed upon the Free Exercise right. *See* Brief for Goldsboro at 33; Brief for Bob Jones at 23. We differ with petitioners, however, concerning the nature of the burden, the nature of the governmental interest, and the appropriate balancing of the two.

A. The Burden on Petitioners' Free Exercise Rights Is Not Significant.

The most comprehensive description of the showing necessary to demonstrate that a significant burden has been placed upon Free Exercise rights was given by this Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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[20] The result would be different, said the Court, analogizing to Sherbert v. Verner, 374 U.S. 398 (1963), if the government chose to withdraw *all* medical benefits from a woman because she chose to have an abortion; such withdrawal would be similar to the withdrawal of *all* employment benefits from Mrs. Sherbert because she chose not to work one day per week on her Sabbath. 448 U.S. at 317 n.19. The present cases, we believe, are much more like *Harris* than *Sherbert*.

A comparison of this case with *Yoder* illustrates how minimal a burden on their religious beliefs and practices has been suffered by Goldsboro and Bob Jones.

In *Yoder*, members of the Amish religion challenged the constitutionality of a statute which required them to send their children to public schools through age 16. This Court acknowledged the state's considerable interest in the education of its citizens but concluded that the Amish had carried their burden of overcoming that interest:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education.

406 U.S. at 235. The Court's opinion underscored four factors important to its decision.

First, the burden of the challenged statute on the Amish practices was "not only severe, but inescapable," in that it directly compelled them to violate their religious beliefs. In this respect, the Court indicated that the Amish burden was greater than that presented in *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), where no such compulsion was presented, but merely a state regulation which made religious practices more expensive. Second, the Court stressed the importance of the fact that the case was "not one in which any harm to the physical or mental health of the child or to the public

safety, peace, order, or welfare has been demonstrated or may be properly inferred. *Id.* at 230. "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Id.* at 224. Third, the Court stated that "[i]t cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." 406 U.S. at 235. Finally, the Court made plain that since the state's educational interest is a "strong" one, it is important that the courts move with "great circumspection" before requiring that exemptions be made from that interest, and that the entitlement to an exemption demonstrated by the Amish was one that "few other" religious groups could make. *Id.* at 235, 236.

Quite unlike *Yoder*, Bob Jones and Goldsboro are unable to demonstrate that racial discrimination is at the heart of their religious beliefs.[21] Even more significant, neither school suffers a direct, inescapable burden upon its religious practices. Rather, as was true in *Braunfeld v. Brown*, *supra*, the government's decision not to confer tax benefits on those schools which are racially discriminatory has merely made operation of petitioners' schools more expensive. It is clear that this is a lesser burden than would be a direct governmental compulsion forbidding Bob Jones' or Goldsboro's discriminatory practices.[22]

We submit, therefore, that the burden on petitioners' Free Exercise rights is not substantial. They have shown

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[21] *See* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314, 321-22 (5th Cir. 1977) (*en banc*) (Goldberg, J., concurring), *cert. denied*, 434 U.S. 1063 (1978).

[22] In fact, the *Braunfeld* plurality specifically listed, as an example of an indirect burden on free exercise, a limitation on the tax deductibility of a religious contribution. 366 U.S. at 606. *See also* Johnson v. Robison, 415 U.S. 361, 385 (1974) (denial of veterans' benefits to conscientious objector who performed alternative service imposed only indirect burden on free exercise).

nothing more than that the exercise of one particular religious practice has become somewhat more costly. We do not say that this is no burden at all. We do say, however, that the burden has not been shown to be significant under the standards set by this Court.

B. The Governmental Interests at Stake are Compelling and Constitutionally Based.

Bob Jones contends in its brief (at 29) that the only governmental interest furthered by the withdrawal of tax benefits is "an indefinitely stated federal policy respecting race." Goldsboro goes even further and claims (at 38) that "the policy against racially discriminatory admissions practices based on the sincere religious beliefs of sectarian schools has not been mandated by either Congress or the courts but rather has been independently formulated by the IRS itself." These assertions are simply not true. The public interest being furthered in these cases has been explicitly and repeatedly articulated by the Congress and by this Court. The source of this interest is most certainly not the IRS' independent, open-ended view of public policy; rather, it is derived from the Constitution itself. Thus, affirmance of the judgment below does not confer upon the Service unbridled discretion to define "the national interest" and to deny or withdraw tax exemptions on that basis.

As we described earlier, the constitutionally based national policy against racial discrimination in education was first given recognition by this Court in *Brown v. Board of Education, supra.* It extends to private schools both because black children excluded from such schools on the basis of race suffer the same injury and humiliation as black children excluded from public schools on the basis of race, and because the growth of discriminatory private schools tends to undermine governmental efforts to end racial discrimination in the public schools.[23]

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[23] The relationship between public school desegregation and the creation or expansion of segregated private schools—as well as the detrimental effects of such schools on constitutionally mandated

As described in the previous Argument, beginning in the late 1950's and culminating in the 1973 decision in *Norwood v. Harrison*, the federal courts gave specific

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public school desegregation—has been well documented. For example, the Fifth Circuit noted as early as 1966:

> Private schools, aided by state grants, have mushroomed in some states in this circuit. The flight of white children to these new schools and to established private and parochial schools promotes resegregation.

United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 848-49 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967) (footnote omitted). *See also* U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67 71 (1967).

Many others have documented the relationship between the development of private academies and public school desegregation. *See, e.g.*, D. BELL, RACE, RACISM AND AMERICAN LAW 496-97 (1973); D. NEVIN & R. BILLS, THE SCHOOLS THAT FEAR BUILT—SEGREGATIONIST ACADEMIES IN THE SOUTH 12 (1976); SOUTHERN REGIONAL COUNCIL, THE SOUTH AND HER CHILDREN: SCHOOL DESEGREGATION 1970-71 69-70 (1971); U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN TEN COMMUNITIES 17, 29, 36, 80 (1973); *Part 3D: Desegregation Under Law, Hearings Before the Select Committee on Equal Educational Opportunity of the United States Senate*, 91st Cong., 2d Sess. (1970); Commentary, *Civil Rights—42 U.S.C. 1981: Keeping a Compromised Promise of Equality to Blacks*, 29 U. FLA. L. REV. 318, 324 n.40 (1977); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1445-46 (1973); Brown, *Academies: Many Parents Would Give Children Bad Educations*, SOUTH TODAY, Dec., 1970, at 12; Brown & Provizer, *The South's New Dual School System: A Case Study*, NEW SOUTH, Fall, 1972, at 59; Miles, *Private Schools: Enrollment Almost Triples in Tarheel State*, SOUTH TODAY, Dec., 1971, at 5-6; Tergen, *Closeup on Segregation Academies*, NEW SOUTH, Fall, 1972, at 50; Tergen, *Private Schools*, Charleston Style, SOUTH TODAY, Jan./Feb., 1971, at 1; *Instant Schools*, NEWSWEEK, Jan. 26, 1970, at 59.

Courts have also long recognized the relationship between private academies and public school desegregation. *See, e.g.*, Gilmore v. City of Montgomery, *supra*; Norwood v. Harrison, *supra*; Griffin v. County School Bd. of Prince Edward County, *supra*; Brumfield v. Dodd, 405 F. Supp. 338 (E.D. La. 1975); Green v. Connally, *supra*; Coffey v. State Educ. Fin. Comm'n, *supra*; Poindexter v. Louisiana Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd* 389 U.S. 571 (1968); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962).

application to this clear national policy against private discrimination in education. Some of the decisions were premised on the Fifth and Fourteenth Amendments. Others, such as *Green v. Connally*, *supra*, were premised on the nation's policy against racial discrimination as reflected in civil rights statutes and the pronouncements of this Court.[24]

The Congress ratified the *Brown* holding and reinforced the ban on federal support for segregated education in the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-2000d-4. This statute, which rests upon Congress' power under the Fourteenth Amendment, has been construed to prohibit recipients of federal assistance from permitting students attending racially discriminatory private schools to participate in federally funded programs.[25] The Congress also exercised its Thirteenth Amendment power to prohibit all racial discrimination in education, whether or not supported with federal funds. 42 U.S.C. § 1981; *see Runyon v. McCrary*, 427 U.S. 160 (1976).[26]

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[24] *See also* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 76 (1972) ("There is an abundance of evidence supporting the *Green* theory that segregated educational facilities contravene public policy; while public rather than private schools are the primary focus of this emphasis on racially open education, in *Green* the court was able to muster a number of earlier judicial decisions extending the same principle to private education").

[25] *See* 41 Fed. Reg. 35553 (August 23, 1976). Section 601 of the Act, 42 U.S.C. § 2000d, provides that racial discrimination cannot be practiced in "any program or activity receiving Federal financial assistance." Tax benefits to private schools are included within this prohibition. *See, e.g.*, McGlotten v. Connally, *supra*, 338 F. Supp. at 460-61, in which the three-judge court held that assistance provided through the tax system is "Federal financial assistance" within the meaning of the Act.

[26] In an effort to lend support to its contentions that the IRS is the sole source of our nation's policy against racial discrimination in private schools, Goldsboro argues that *Runyon* is irrelevant to the present case because it reserved the question of the appropriate application of § 1981 to a school that discriminates on religious grounds. Brief for Goldsboro at 39. But this is not so. Even if in a particular case the First Amendment might give rise

In summary, we submit that this nation has a strong, clearly defined, constitutionally rooted policy against racial discrimination in all schools of this country, and has a constitutional ban against any governmental support for such discrimination. The sources of this policy and ban are the Fifth, Thirteenth, and Fourteenth Amendments to our Constitution. As is next discussed, petitioners have not shown themselves to be entitled to an exemption from these compelling governmental interests.

C. The Government's Interests are Sufficiently Compelling to Outweigh the Minimal Burden on Petitioners' Free Exercise Rights.

We agree with petitioners that resolution of their Free Exercise claim requires a balancing of their interests against those of the public. This Court has recently indicated that such a balancing is a "delicate" process, *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978), one that requires a "sensitive and difficult accommodation of the competing interests involved." *Id.* at 635 n.8 (Brennan, J., concurring in the judgment). It is for this reason that the inquiry into the precise nature of

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to a *defense* sufficient to defeat § 1981's application to a sectarian school's racial discrimination, it would not be because § 1981 and the government's constitutionally rooted policies did not apply to that school. Rather, it would be because § 1981 and its underlying policies were overridden by a more important policy. Fiedler v. Marumsco Christian Schools, 631 F.2d 1144, 1150 (4th Cir. 1980) (holding that in a § 1981 action, "the sectarian nature of the school is important only insofar as it may give rise to a constitutional defense to the claim [of racial discrimination]"). *See* Note, *Section 1981 after Runyon v. McCrary: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race*, 1977 DUKE L.J. 1219, 1252 [hereinafter cited as "1977 DUKE L.J."] ("Although *Runyon's* holding was limited to nonsectarian schools, this governmental interest remains unchanged when a sectarian school asserts a free exercise claim as a defense to a section 1981 action. The only difference is that the courts must now determine whether the government's interest is sufficient to outweigh the opposing first amendment claim").

each of the competing interests—including an examination of the ramifications of preferring one or the other interest—must be as thorough as that undertaken by this Court in *Yoder*. In our view, petitioners have either overlooked or misjudged most of the important elements in this balancing process.

First, petitioners have woefully mischaracterized the government's interest. As we have shown above, what is at stake here is not a vaguely conceived, unsupported IRS view of public policy, but rather, constitutionally rooted and constitutionally compelled public interests of the highest order—interests that have been given explicit voice and definition by this Court and the Congress. There can be no doubt that the government's interest in carrying out *constitutional obligations* is a "compelling" one, even in the face of a First Amendment claim. *See Widmar v. Vincent*, 50 U.S.L.W. 4062, 4064 (U.S., Dec. 8, 1981).

Second, quite unlike the cases heavily relied on by petitioners—*Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 101 S.Ct. 1425 (1981)[27]—here the government's interest is enhanced still further by the number of other exemptions that may have to be granted were petitioners to prevail.[28] Thus, there are thousands of private schools in this country which are currently recognized as tax exempt under Section 501(c)

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[27] In both those cases, the only governmental interests advanced to balance against the plaintiffs' Free Exercise rights were the state's concern with protecting unemployment insurance funds, and a speculative contention concerning the avoidance of inquiry into religious beliefs. Since in neither case was there any reason to expect that the number of people seeking a religious exemption (and therefore unemployment benefits) would be significant, and since there had been no showing that there had been or likely would be any inquiries into religious beliefs, the Court concluded that the State's interest was minimal. Hence, the plaintiffs' rights prevailed. 374 U.S. at 407; 101 S. Ct. at 1432.

[28] *Cf.* Braunfeld v. Brown, *supra*, 366 U.S. at 606-09.

(3), or are claiming that status.[29] 80% of these private schools are church-affiliated, and they enroll 86% of all students attending private schools.[30] The threat to the public policy against governmental support of racial discrimination in private schools will be considerable if the petitioners' exemptions are granted.[31]

Third, there is another important factor ignored by petitioners which weighs heavily against them in the balancing process. "When balancing the interests of the State against the free exercise interests of individuals or institutions, invariably the first determination made by the courts is whether the religious practice affects or collides with the rights of others." [32] This is because the government's interest in regulating religiously based conduct is greater when that conduct adversely affects the welfare of others. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 630 (1943).

Thus, while in *Sherbert*, *Yoder*, and *Thomas* the plaintiffs' religious exercise threatened no harm to the interests of others, here that is not so. Here, petitioners'

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[29] *See* NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., PRIVATE SCHOOLS IN AMERICAN EDUCATION 15, 17 (1981).

[30] *See id.*; Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U.L. REV. 847; Note, *The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?*, 56 NOTRE DAME LAW. 141 (1980).

[31] *See* Brown v. Dade Christian Schools, Inc., *supra*, 556 F.2d at 323 n.17, where Judge Goldberg expressly noted that, unlike the situations presented in *Yoder* and *Sherbert*, if religiously based discrimination were allowed to create an exemption to § 1981, numerous fraudulent claims might follow. He reasoned that the first exemption granted for such discrimination is "not one that we could recognize without inviting numerous additional claims. . . . Those who turned to white academies in response to public school integration will undoubtedly seek ways to avoid *Runyon v. McCrary*'s mandate. . . . We therefore cannot view Dade Christian's claim in isolation." *Id.* at 324.

[32] 1977 DUKE L.J. at 1255; *see* cases cited therein.

discrimination directly affects those who are refused admission to their schools on racial grounds (and, in the case of Bob Jones, those who are denied the opportunity to freely associate with persons of other races). Moreover, the government's continued support of such racially discriminatory private schools cannot help but frustrate the equal-protection rights of children attending public schools.[33]

Finally, contrary to the contentions of petitioners, numerous cases have already been decided where public interests of lesser, as well as equal, magnitude as those presented here have prevailed over Free Exercise rights; in some, unlike the instant matter, government directly prohibited a religious practice;[34] in others, the Free Exercise claim asserted was, as here, religiously based racial discrimination.[35] One of the latter cases involved Bob Jones itself. *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).[36]

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[33] *See* note 4 and accompanying text, *supra*; note 23 *supra*.

[34] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (state's interest in protecting minors held sufficient to support application of statute prohibiting minors from selling merchandise in public places to distribution of religious literature by minor); Reynolds v. United States, 98 U.S. 145 (1878) (state's interest in restricting "odious" practice of polygamy held to justify application of statutory ban to adherents of Mormon religion).

[35] *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941 (D.S.C. 1966), *rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *modified on other grounds and aff'd per curiam*, 390 U.S. 400 (1968).

[36] The court held that Bob Jones' racially discriminatory policies required the termination of federal assistance programs to veterans at the school, under the proviso of the Civil Rights Act, 42 U.S.C. § 2000d, forbidding such federal assistance for discriminatory schools. In upholding the termination of benefits, the court rejected the same Free Exercise claim being made here, noting (as we have stressed in this brief) that the policies underlying the Civil Rights Act are of great weight, and that the indirect burden on Bob Jones was minimal. 396 F. Supp. at 607-08 and n.30.

So far as we are aware, the result reached in the previous *Bob Jones* case is in accordance with that in all other cases which have addressed the issue and is widely supported by the commentators. We submit that the same result should be reached here. Given the undeniable strength of the public policy against lending government support to racially discriminatory schools—a policy we urge the Court to find is a constitutionally compelled one; given further the facts that petitioners' religious practice threatens the welfare of others, and that the granting of their exemption threatens to create a loophole undermining the policy; and, finally, given the fact that the burden on petitioners' Free Exercise has not been shown to be significant, we submit that the balance tips decidedly against petitioners and any others similarly situated.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should affirm the decisions below, and, in so doing, declare that the conferral of tax benefits on any private racially discriminatory institution is unconstitutional and that the refusal to confer such benefits on any such school, even one whose discrimination is religiously based, does not violate the First Amendment.

Respectfully submitted,

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1

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CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

RECEIVED
JAN 14 1982
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SUPREME COURT, U.S.

January 14, 1982

Hon. Alexander L. Stevas, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Goldsboro Christian Schools, Inc. v. United States, No. 81-1
Bob Jones University v. United States, No. 81-3

Dear Mr. Stevas:

On December 31, 1981, the Lawyers' Committee for Civil Rights, with the consent of the parties in the above-captioned consolidated cases, filed a brief as amicus curiae supporting the position of the respondent United States of America.

Thereafter, on Friday, January 8, 1982 the United States submitted a Memorandum to the Court advising of certain actions which had been "initiated" or "commenced" by the Department of the Treasury, and requesting that the judgments below be vacated as moot. The Court has not yet acted upon the suggestion of mootness.

As amicus curiae we wish to bring to the attention of the Court certain further developments which may bear upon the question of mootness. Specifically, I am lodging with this letter sufficient copies for the Court of a Motion filed yesterday morning in the United States District Court for the District of Columbia in the case of Green v. Regan, Civ. No. 1355-69.

As is reflected in the body of the motion and in the supporting memorandum, the Green plaintiffs (whom I also represent) are seeking injunctive relief to prevent the Secretary of the Treasury and the Commissioner of Internal Revenue from revoking or failing to enforce the same Revenue Rulings and Revenue Procedures as are identified in footnote 1 to the government's January 8 Memorandum in the above-captioned cases. The grounds alleged for this relief are

that such revocation or failure to enforce would violate a prior judgment against the Secretary and the Commissioner issued in the Green case, Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd mem. sub nom. Coit v Green, 404 U.S. 997 (1971).

As is also reflected in the papers filed yesterday, the relief sought would have application outside the State of Mississippi and if granted would therefore be likely to affect the status of the Goldsboro and Bob Jones matters. For this reason, although the motion has only yesterday been filed, counsel believe they have an ethical obligation to bring it to the Court's attention. We shall, of course, notify you of any subsequent developments in the matter and, as soon as is appropriate, intend to file a formal motion to supplement our amicus brief so as to reflect those developments.

We should appreciate greatly your making the Court aware of these developments in whatever manner you deem appropriate.

Respectfully yours,

Norman J. Chachkin
Counsel of Record for
Amicus Curiae Lawyers'
Committee for Civil
Rights Under Law

/c
cc: Hon. Lawrence G. Wallace
William B. Ball, Esq.
William G. McNairy, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED
JAN 12 1982
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DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 1355-69
DONALD T. REGAN, et al., Defendants.	)	

MOTION TO VACATE STAY OF PROCEEDINGS, TO SHORTEN TIME FOR RESPONSE HERETO, AND FOR FURTHER INJUNCTIVE RELIEF TO ENFORCE DECLARATORY JUDGMENT AND PRESERVE THE STATUS QUO

Plaintiffs, by their undersigned counsel, respectfully pray that this Court: (a) vacate the stay of all proceedings in this matter entered on January 6, 1982; (b) shorten the time for filing responses hereto; and (c) grant them further injunctive relief, to enforce the June 30, 1971 declaratory judgment and permanent injunction in this case and to preserve the status quo which has resulted from this Court's prior Orders.

In support of this motion, plaintiffs respectfully show the Court as follows:

1. This suit was originally instituted in 1969 by plaintiff black schoolchildren and their parents, challenging on statutory and constitutional grounds the then-effective policy of the Internal Revenue Service and the Department of the Treasury to grant federal tax exemptions to racially discriminatory private schools. On January 12, 1970, a three-judge district court granted preliminary injunctive relief on constitutional grounds to prevent the award of tax-exempt status to any Mississippi private school unless the defendants determined that the school was not racially discriminatory. Green v. Kennedy, 309 F. Supp. 1150 (D.D.C.), appeal dismissed sub nom. Cannon v. Green, 398 U.S.

956 (1970).[1/]

2. On June 30, 1971, the three-judge district court issued a declaratory judgment which provides as follows:

> A. Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.
>
> B. As used in this Order, the term "racially nondiscriminatory policy as to students" means that the school or other educational institution admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extra-curricular programs.

Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

3. This Court's declaratory judgment has never been modified; although they resisted its entry, the defendants neither appealed from it nor have ever sought its modification by this Court. Its substance was embodied in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, but the declaratory judgment was issued explicitly because, as the three-judge court put it:

> We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion.

Green v. Connally, supra, 330 F. Supp. at 1170-71.

4. The three-judge court also granted permanent injunctive relief, establishing procedures and standards which defendants must follow to ensure that no racially discriminatory

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1/ The injunctive relief was limited to private schools in Mississippi because the named plaintiffs were all Mississippi residents. See Green v. Connally, 330 F. Supp. 1150, 1174 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

Mississippi private school is granted, or retains, tax-exempt status. See 330 F. Supp. at 1179-80; id. at 1173-77.[2] Pursuant to the permanent injunction, defendants "revoked exemption letters of 106 schools that refused to adopt and publicize the required racially nondiscriminatory policy."[3]

5. On July 23, 1976, plaintiffs filed a "Motion for an Order Substituting Parties Defendant, to Enforce Decree and for Further Declaratory and Injunctive Relief." Plaintiffs alleged that the defendants had failed to carry out the declaratory judgment and injunctive decree because the standards applied to determine whether a private school followed a racially discriminatory policy were inadequate. On May 5, 1980 and June 2, 1980, this Court issued Orders supplementing the permanent injunctive decree of the three-judge court and delineating the general standards to be applied by defendants to determine whether a private school is truly nondiscriminatory. Defendants did not appeal those Orders, and as a result of their entry, five additional private schools' tax exemptions have already been withdrawn. See 1981-37 I.R.B. 102 (September 14, 1981).

6. Following entry of this Court's May 5 and June 2, 1980 Orders, the Clarksdale Baptist School successfully sought leave to intervene in this action to contest, on First Amendment grounds, the applicability of those Orders to a church-affiliated school. That First Amendment claim was being litigated in this matter when this Court on January 6, 1982 stayed all further proceedings pending the Supreme Court's ruling in Goldsboro Christian Schools, Inc. v. United States (No. 81-1) and Bob Jones University v. United States (No. 81-3), consolidated cases which involve a

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2/ See note 1/ supra.

3/ Letter from IRS Commissioner Donald Alexander to Hon. Charles Rangel, attached as Exhibit H to "Memorandum in Support of Defendants' Opposition to Plaintiffs' Motion to Enforce Decree and for Further Declaratory and Injunctive Relief and in Support of Defendants' Motion to Dismiss Plaintiffs' Action," filed herein on or about October 1, 1976, at p. 1.

different First Amendment issue.

7. However, on January 8, 1982, in a "Memorandum for the United States" filed in the Goldsboro and Bob Jones cases (a copy of which is attached hereto as Exhibit "1"), the government requested that the Supreme Court vacate the judgments below as moot because, it informed the Court, the Treasury Department "has initiated the necessary steps to reinstate" the tax exemptions of the two schools involved, and has also "commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code." (In a footnote, the Memorandum identifies the Revenue Rulings and Revenue Procedures to be revoked, including Rev. Rul. 71-447, see ¶ 3 supra.) 4/ On the same date, the Treasury Department announced that it would "no longer revoke or deny tax-exempt status for . . . educational . . . organizations" which have racially discriminatory policies. (A copy of the Treasury Department's News Release and the accompanying materials distributed at its press conference is attached hereto as Exhibit "2".)

8. Neither the government's submission to the Supreme Court in Bob Jones and Goldsboro nor the Treasury Department's News Release refers to this Court's outstanding declaratory judgment and permanent injunction in this case. The defendants have not sought relief from this Court's prior Orders. Instead, defendants have unilaterally determined to ignore those Orders, and to follow a construction of Section 501(c)(3) of the Internal Revenue Code which is contrary to the binding interpretation of that provision announced by the three-judge court in this case in 1971 and applied explicitly to defendants through the declaratory judgment.

9. The declaratory judgment was issued by this Court precisely to prevent defendants from doing what they purported to do

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4/ By letter dated January 11, 1982, defendants informed this Court of their actions in the two cases.

on January 8, 1982. As Judge Leventhal wrote, that judgment was entered to afford plaintiffs "relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion." 330 F. Supp. at 1170-71. Defendants' unilateral determination to recognize discriminatory private schools as tax exempt is a willful and contemptuous disregard of this Court's declaratory judgment.

10. Plaintiffs are entitled to further injunctive relief to enforce the declaratory judgment, as well as the outstanding permanent injunction. See 28 U.S.C. § 2202. Since this Court's prior rulings are the "law of the case," there are no complex issues to be tried and the Court should act promptly to preserve the integrity of its judgments, and to prevent defendants from restoring the tax-exempt status of, or granting additional applications for exemption to, racially discriminatory private schools.

11. While the declaratory judgment and permanent injunction rested upon this Court's interpretation of the Internal Revenue Code, the Court recognized the strength of plaintiffs' constitutional claims, Green v. Kennedy, supra, and its construction of Section 501(c)(3) had constitutional dimensions. See 330 F. Supp. at 1164-65. The relief requested, therefore, is necessary to protect plaintiffs' constitutional, as well as statutory, rights.

12. Further injunctive relief preventing defendants from revoking Rev. Rul. 71-447 and the related Revenue Rulings and Procedures identified in n.1 of Exhibit "1", and from restoring tax-exempt status to racially discriminatory private schools, will also serve the purpose of preserving the status quo.

WHEREFORE, for the foregoing reasons, plaintiffs respectfully pray that the Court grant them the following relief:

a. Enter its Order vacating the stay of all further proceedings in this case entered January 6, 1982 so that the issues raised in the instant motion may be considered and adjudicated by the Court;

b. Enter its Order shortening the time within which the defendants and the defendant-intervenors, if they so desire, may respond to this motion (to a period of three (3) days following the entry of the Order);

c. Schedule a hearing on this motion at the earliest practicable opportunity;

d. After hearing such oral argument as the Court deems appropriate, enter its Order enjoining the defendants from taking any steps to revoke, or from failing to enforce, Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Proc. 75-231, 1975-1 Cum. Bull. 158; and Rev. Proc. 75-50, 1975-2 Cum. Bull. 587, in order that the declaratory judgment previously issued by this Court shall be effective;

e. After hearing such oral argument as the Court deems appropriate, enter its Order enjoining the defendants from failing to enforce fully, or from taking any steps inconsistent with, the prior injunctive decrees of this Court respecting the tax-exempt status of private schools in Mississippi, including but not limited to any steps to restore the tax-exempt status of any private school in Mississippi which had its application for tax-exempt status denied or whose tax-exempt status was revoked by defendants or their predecessors in office on the basis of the declaratory judgment in this matter, or upon the basis of the Court's prior injunctive decrees in this matter;

f. Grant plaintiffs their costs herein, reasonable attorneys' fees as part of the costs, and such other and further relief as appears appropriate and just to the Court.

Respectfully submitted,

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Attorneys for Plaintiffs

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General

Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court granted writs of certiorari in the above-captioned cases and ordered consolidation on October 13, 1981. Petitioners seek reversal of the court of appeals' decisions upholding Internal Revenue Service rulings that were applied to them, because of certain racially discriminatory practices, to deny tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 ("Code") and sister Code provisions regarding federal social security taxes (Section 3121(b)(8)(B) of the Code) and federal unemployment taxes (Section 3306(c)(8) of the Code), and to deny them status as eligible donees of charitable contributions under Section 170(a) and (c) of the Code.

Since the filing of our Brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code. 1/

The United States therefore asks that the judgments of the court of appeals be vacated as moot.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

JANUARY 1982

1/ The applicable rulings are Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

TREASURY NEWS
Department of the Treasury • Washington, D.C. • Telephone 566-

FOR IMMEDIATE RELEASE
Friday, January 8, 1982

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TREASURY ESTABLISHES NEW TAX-EXEMPT POLICY

The Treasury Department announced today that without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational or scientific organizations on the grounds that they don't conform with certain fundamental public policies.

"In the past," said Deputy Treasury Secretary R. T. McNamar, "the IRS has revoked the tax exemptions of organizations which, did not adhere to certain fundamental national policies, such as those forbidding discrimination on the basis of race, even though this requirement is not explicitly stated in the Internal Revenue Code except in the case of social clubs."

"Whether or not the Treasury Department or this Administration agrees with the position of the IRS in particular cases is not the issue," McNamar stated. "The question is whether the IRS is required under the Code as enacted by Congress to decide -- as a condition to granting or continuing tax-exempt status -- whether private organizations conform with fundamental national policies. The Treasury Department has concluded that this kind of judgment -- which may mean life or death for certain organizations -- is fundamentally a question for Congress; and if the authority to make this judgment is given by Congress to an administrative agency it should be done in explicit terms and subject to specific guidelines."

As a consequence of this decision, the IRS will restore the tax exemption of certain organizations which had previously been revoked. In particular, the appeal of Bob Jones University, and the Goldsboro Schools, which are currently before the Supreme Court will be rendered moot.

"In taking this action," McNamar stated, "we are attempting to protect the independence of all private tax-exempt organizations -- many of which may follow practices and adhere to principles with which we disagree. But before the government gets into the business of deciding which organizations are worthy of tax exemption and which are not, we want Congress to fully consider the implications of such a course."

The Treasury Department decision reflects the advice of the Department of Justice that the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions in question is not supported by the language of the Internal Revenue Code or its legislative history. The Internal Revenue Code provides tax exemptions for "Corporations (or other organizations) organized and operated exclusively for religious, charitable, scientific ... or educational ... purposes ...." IRC Section 501(c)(3), 26 U.S.C. Section 501(c)(3). The Justice Department has advised that both the language of Section 501(c)(3) and the statute's legislative history provide no support for the statutory interpretation adopted by the Commissioner in 1970. Thus the IRS is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy.

This new policy is reflected in a motion filed with the Supreme Court today by the Justice Department to vacate a case in which the Internal Revenue Service revoked the tax-exempt status of Bob Jones University and Goldsboro Christian Schools. IRS revoked the Bob Jones University tax exemption in 1970 on the grounds that the school's racial policies violated Federal policies on racial discrimination. This decision was nullified by the U.S. District Court in South Carolina on June 30, 1971. However, the lower court's decision was reversed by the 4th Circuit Court of Appeals on December 30, 1980.

Similarly in 1974 the IRS determined that Goldsboro Christian Schools Inc. did not qualify for an exemption on the grounds that it maintained a racially discriminatory admissions policy. On May 7, 1980 the District Court for the Eastern district of North Carolina upheld the IRS decision. On February 24, 1981 the Court of Appeals for the 4th Circuit affirmed this judgement period.

Both schools appealed the Circuit Court decision to the Supreme Court which accepted their petitions for certiorari on October 13, 1981.

January 8, 1982

Bob Jones University Case
Chronology of Events

1. Until 1970, the Internal Revenue Service recognized Bob Jones University ("BJU") as a tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code.

2. On November 30, 1970, the Internal Revenue Service notified BJU and other private schools that it would no longer recognize organizations as legally entitled to tax-exemption which maintained a racially discriminatory admissions policy.

3. BJU responded that it did not admit black students and that it did not intend to alter that policy in September of 1971.

4. BJU filed suit to enjoin revocation on September 9, 1971. In 1974, the Supreme Court ruled that such a suit was barred by the Anti-Injunction Act and the Declaratory Judgment Act.

5. The Internal Revenue Service began a formal audit/examination to determine payroll tax liability and to consider revocation of BJU's tax exemption during July, 1974.

6. In January, 1976, the Internal Revenue Service issued a final notice of revocation to BJU in January, 1976, effective from December 1, 1970.

7. On May 4, 1976, BJU filed suit in federal district court in South Carolina seeking a refund of $21 in federal unemployment tax as a means of seeking reinstatement of it exemption. The United States counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975.

8. The District Court held BJU qualified for tax exemption on December 26, 1978 and entered judgment for BJU in the refund suit. In a separate suit decided the same date, the District Court ordered the Secretary of the Treasury and Commissioner of Internal Revenue Service to restore BJU tax exempt status.

9. The Court of Appeals for the Fourth Circuit reversed both judgments in 2-1 decision and held that BJU was not entitled to tax exemption and entered judgment for the Government on December 30, 1980.

10. BJU filed a petition for a writ of certiorari to the Supreme Court on July 1, 1981. The petition for a writ was granted October 13, 1981.

11. The parties briefs were set for filing on December 31, 1981.

Goldsboro Christian Schools, Inc.

Chronology of Events

1. Goldsboro Christian Schools, Inc. ("Goldsboro") is a nonprofit organization incorporated in 1963; however, Goldsboro has never been granted tax-exempt status.

2. On July 10, 1970, the Internal Revenue Service announced that it would no longer recognize the tax-exempt status of private schools maintaining racially discriminatory admissions policies.

3. After audit in 1974, the Commissioner of Internal Revenue determined that Goldsboro did not qualify for exemption from federal unemployment and social security taxes and accordingly assessed those taxes against Goldsboro.

4. Goldsboro commenced a suit for refund of its partial payment of such taxes and the Government counter-claimed for the balance of the taxes assessed.

5. On May 7, 1980, the District Court for the Eastern District of North Carolina rendered judgment for the Government that Goldsboro's exemption was properly denied.

6. On February 24, 1981, the Court of Appeals for the Fourth Circuit in a 2-1 decision affirmed the judgment for the Government.

7. Goldsboro filed its petition for certiorari with the Supreme Court on July 2, 1981. The petition was granted October 13, 1981.

8. The parties briefs were set for filing on December 31, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION NO. 1355-69
	)	
DONALD T. REGAN, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
MOTION TO VACATE STAY OF PROCEEDINGS,
TO SHORTEN TIME FOR RESPONSE HERETO, AND
FOR FURTHER INJUNCTIVE RELIEF TO ENFORCE DECLARATORY
JUDGMENT AND PRESERVE THE STATUS QUO

The basis for plaintiffs' application to this Court is simple and straightforward, as set forth in their motion. In this litigation, which now stretches back more than a decade, the plaintiffs have obtained significant declaratory and injunctive relief against the defendants or their predecessors in office. Without any prior notice to either the plaintiffs or to the Court, defendants have publicly announced -- and have formally advised the United States Supreme Court in a Memorandum signed by the Acting Solicitor General -- that they will now follow an interpretation of Section 501 (c)(3) of the Internal Revenue Code in direct conflict with the declaratory judgment of this Court, and a policy of recognizing racially discriminatory private schools as tax exempt in direct conflict with the permanent injunction entered by this Court. The legal issues involved have long been settled by the prior decisions in this matter which are the "law of the case" binding upon the defendants. Hence, defendants' actions are willful and contemptuous conduct showing disrespect for this Court.

Plaintiffs do not, at this time, seek any adjudication of contempt, however. Instead, we ask that the Court grant further injunctive relief to protect plaintiffs' adjudicated rights and to preserve the integrity of the Court's judgments.

Because the principal authority upon which plaintiffs rely are the prior decisions in this very case, as cited in the body of their motion, this Memorandum will be brief.

Recent Events Giving Rise to the Filing of this Motion

As described in ¶ 6 of the motion, after this Court entered Orders on May 5 and June 2, 1980 supplementing the permanent injunction issued in 1971, Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971), the Clarksdale Baptist School was granted leave to intervene in order to litigate its claim that those Orders, as applied to it, violated the First Amendment. Plaintiffs filed a Motion for Summary Judgment in their favor on the school's claims on June 30, 1981 and by Order entered July 15, 1981 this Court established a schedule for completion of discovery and submission for decision in early 1982.

On October 13, 1981 the Supreme Court granted writs of certiorari to review two judgments of the Court of Appeals for the Fourth Circuit upholding the decision by the Internal Revenue Service to deny tax benefits to two schools which admittedly practice racial discrimination. Goldsboro Christian Schools, Inc. v. United States; Bob Jones Univ. v. United States, 50 U.S.L.W. 3278 (Oct. 13, 1981). Both schools argued in their Briefs on the merits in the Supreme Court that because their racially discriminatory practices reflected their religious beliefs, withholding of tax bene-

fits because of these practices violates their First Amendment rights. Both schools also asked the Supreme Court to reject this Court's interpretation of Section 501(c)(3) of the Internal Revenue Code as embodied in its declaratory judgment in this action.

Based upon the possibility that the anticipated Supreme Court ruling in the Goldsboro and Bob Jones cases (which were consolidated) would clarify the legal standards applicable to both Clarksdale Baptist School's First Amendment claim and also to its alternative argument that the declaratory judgment was an incorrect interpretation of Section 501(c)(3), the School on December 11, 1981 asked this Court to stay further proceedings in this case until Goldsboro and Bob Jones were decided. On December 15, 1981 the federal defendants (who had supported the granting of certiorari in order to "dispel the uncertainty surrounding the propriety of the Service's ruling position and foster greater compliance on the part of the affected institutions," Brief at 17) responded to this motion by endorsing it "strongly." This Court granted the requested stay on January 6, 1982.

Having taken the position that this litigation should be stayed so that the Goldsboro and Bob Jones cases might furnish guidance to this Court, it was inappropriate, at the very least, for the government on January 8, 1982 -- just two days after the stay was granted -- to take action preventing any Supreme Court decision in those two cases. Moreover, the basis upon which the government purports to justify this reversal of position is nothing less than shocking: in direct violation of this Court's judgment and Orders, the federal defendants have asserted before the Supreme Court, and have announced publicly, that they lack authority to deny

tax benefits to racially discriminatory private schools and that they will immediately begin to grant tax exemptions to such schools.

As described in the "Memorandum for the United States" filed with the Supreme Court on that date (a copy of which is attached to the motion as Exhibit "1"), the government has sought to moot those cases by restoring tax-exempt status to these admittedly discriminatory schools and refunding the taxes paid as the basis for the refund suits brought by the schools. The grounds upon which the Secretary of the Treasury and the Commissioner of Internal Revenue -- the named defendants in this action -- are acting to restore the exemptions are also described briefly in the government's Memorandum filed with the Supreme Court, and are elaborated upon in the documents issued by the Treasury Department on January 8 at a press conference held to announce the change. As stated in the Memorandum, the Treasury Department "has [already] commenced the process necessary to revoke forthwith the pertinent Revenue Rulings [identified in the footnote as including Rev. Rul. 71-447, which enunciates the fundamental principle that schools with racially discriminatory policies do not qualify for tax exemption] that were relied upon to deny [Goldsboro and Bob Jones] tax exempt status. . ." (emphasis added).

The News Release disseminated by the Treasury Department on January 8 (Exhibit "2" to the motion) makes crystal clear the intention of the defendants to flout the previous Orders and the declaratory judgment issued by the Court in this case. In the very first sentence of the release, defendants bluntly state that "the Internal Revenue Service will no longer revoke or deny tax-exempt status for . . . educational . . . organizations" which practice racial discrimination. Moreover, at p. 2 of the Release, defendants baldly demonstrate their disregard of the considered judgment

of this Court. Seeking to justify what they have described merely as a change in policy -- and not as the violation of an outstanding judgment -- defendants state:

> The Treasury Department decision reflects the advice of the Department of Justice that the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions in question is not supported by the language of the Internal Revenue Code or its legislative history. . . . The Justice Department has advised that both the language of Section 501(c)(3) and the statute's legislative history provide no support for the statutory interpretation adopted by the Commissioner in 1970.

Of course, the three-judge court in this case concluded in 1971 precisely to the contrary. See Green v. Connally, supra, 330 F. Supp. at 1156-64. But defendants' public statements make no reference to the holding of this Court nor to its declaratory judgment, which unquestionably remains binding upon them. This is particularly ironic since the three-judge court expressly entered its 1971 declaratory judgment in order to prevent defendants from doing precisely what they have now done -- reverse their construction of the Code so as to grant tax benefits to racially discriminatory private schools:

> The July 1970 Press Release does not indicate whether the new construction is considered mandatory or merely within the sound discretion available to the IRS in construction of the Code. If defendants' construction were discretionary it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion.

Green v. Connally, supra, 330 F. Supp. at 1170-71.

The Need for Further Injunctive Relief

As the description of recent events above makes clear,

defendants have deliberately and unequivocally decided that they will no longer comply with the judgments of this Court. As reported widely in the news media in recent days, the Service admits that it will now recognize as tax exempt "more than 100" private schools which previously lost their exemptions because they practice racial discrimination. Under these circumstances the need for further relief to effectuate the judgments and Orders of this Court is manifest.

Plaintiffs have been deprived, by this unilateral action of the defendants, of the protection of this Court's judgments and of the relief they have secured through bitterly contested, adversary litigation before this Court. More important, the very significant time and effort expended in this matter by the three-judge court in 1970 and 1971, and by this Court since dissolution of the three-judge panel in 1976, in reviewing and weighing the extensive documentary and other evidence submitted in the case in order to reach the considered judgments which have been entered, and in order to frame the carefully delineated injunctive decrees which have been issued, will have been wasted if defendants are not restrained from their present course.

The relief which the plaintiffs seek in their accompanying motion is designed to prevent this result and to effectuate the prior judgments and Orders of this Court. Such relief would not bar the defendants from seeking, on proper application to the Court, a modification of the prior decrees.[1/] Defendants have always been free to seek such a modification; but they are not now, and never have been, free to take unilateral action in patent disregard of this Court's Orders and judgments. The Court should, therefore, grant the relief plaintiffs seek to maintain

---

1/ Of course, on any such motion the defendants would bear a heavy burden of justification. See, e.g., United States v. Swift & Co., 286 U.S. 106 (1932).

the status quo which has resulted from its prior Orders. This relief would restrain the defendants from flouting the Court's Orders unless and until they present to the Court a compelling justification for modification of those Orders. (Because prior judgments and Orders in this case were fully litigated between the plaintiffs and the defendants, the relief now sought by the plaintiffs cannot in any way be viewed as an attempt to encroach upon the administrative discretion of the government; see also the quoted language from Green v. Connally at p. 5 supra.)

Plaintiffs seek further injunctive relief which will preserve and enforce both the declaratory judgment and the permanent injunction granted in this case (see ¶¶ d. and e. of the prayer for relief in the motion, at p. 6). See 28 U.S.C. § 2202.[2/]

The declaratory judgment, quoted in full in ¶ 2 of the motion, authoritatively construes Section 501(c)(3) of the Internal Revenue Code to prohibit the grant of tax-exempt status to private schools which are not operated on a racially nondiscriminatory basis. This essential holding has repeatedly been approved by every court which has considered it. E.g., Norwood v. Harrison, 413 U.S. 455, 463 (1973); Bob Jones Univ. v. United States, 639 F.2d 147, 151 & n.4 (4th Cir. 1980), cert. granted, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981). It has also been adopted and approved by the Congress. See, e.g., S. Rep. No. 1318, 94th Cong., 2d Sess. 8 n.5 (1976), reprinted in [1976]

2/ A court has inherent power to protect and effectuate its prior judgments, see, e.g., Resident Advisory Bd. v. Rizzo, 503 F. Supp. 383, 388 (E.D. Pa. 1980) and cases cited, and the court's discretion to do so is at its broadest when, as here, the public interest and the rights of a large group of people are involved, see, e.g., United States v. Washington, 459 F. Supp. 1020, 1115 (W.D. Wash. 1978), aff'd 645 F.2d 749 (9th Cir. 1981), and cases cited.

U.S. CODE CON. & ADM. NEWS 6058; 125 CONG. REC. H 5883-85, 5982 (daily ed., July 13 and 15, 1979) (statements by opponents of proposed IRS Revenue Procedure endorsing denial of tax-exempt status to discriminatory schools).

This bedrock principle is the foundation not only of Rev. Rul. 71-447, see ¶ 3 of motion, but also of all other Revenue Rulings and Procedures in this area. As the government's Supreme Court submission recognizes in n.1, the IRS must revoke these rulings and procedures in order to complete implementation of the "policy change" announced on January 8 in contravention of the declaratory judgment. For this reason, plaintiffs seek injunctive relief restraining the defendants from revoking, or from failing to enforce, these applicable Revenue Rulings and Revenue Procedures without further Order of this Court.

This is clearly the minimum relief to which plaintiffs are entitled in order to effectuate the prior declaratory judgment. While this relief would have application to the actions of defendants respecting private schools outside Mississippi as well as within that state, this result is entirely consistent with the original relief granted in this case. Nothing in the wording of the declaratory judgment (see ¶ 2 of motion), and nothing in the three-judge court's description of the declaratory relief it was granting (see 330 F. Supp. at 1170-71) suggests that the legal principle underlying the Court's declaratory judgment was to be limited to Mississippi schools. The essential legal question decided in Green v. Connally did not turn upon the happenstance of the location of the particular discriminatory schools. Rather, the principle established by the declaratory judgment turned solely on the proper construction of Sections 501(c)(3) and 170(a)-(c) of the Internal Revenue Code. The holding was that the Code must be construed to prohibit the granting of tax benefits to

racially discriminatory private schools.[3/] That is the holding the government has now inexplicably chosen to ignore.

The second category of further injunctive relief sought in plaintiffs' motion will preserve and enforce the original permanent injunction and the supplementary Orders issued by this Court in 1980. It will ensure that plaintiffs are not denied the fruits of the decrees by IRS actions to restore or grant new tax exemptions to private schools in Mississippi without applying the procedures and standards contained in those decrees. This portion of the injunctive relief presently sought by the plaintiffs is limited to Mississippi schools just as were the original and supplementary injunctive decrees. There can be no question about plaintiffs' entitlement to effective compliance by the defendants with the prior decrees in this action.

3/ As the Court stated in the section of its opinion discussing its injunctive decree:

> To obviate any possible confusion the court is not to be misunderstood as laying down a special [substantive] rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt. Our [injunctive] decree is limited to schools in Mississippi because this is an action in behalf of black children and parents in Mississippi, and confinement of this aspect of our relief to schools in Mississippi applying for tax benefits defines a remedy proportionate to the injury threatened to plaintiffs and their class.

330 F. Supp. at 1174. In contradistinction, the injunctive relief granted in 1971 shaped special procedures for defendants to follow in light of "the conditions in Mississippi which have already led to denial of plaintiffs' rights in the past." 300 F. Supp. at 1171. The three-judge court "identified two areas that we conclude, on reflection, are appropriate for our final decree as a condition for advance assurances for Mississippi private schools in view of the 'badge of doubt' context already discussed." Id. at 1174.

Finally, plaintiffs emphasize again that they are not seeking to bar the government from applying to this Court for modification of its judgments and decrees -- although we are quick to add that we know of no adequate legal ground for modification. Under our constitutional scheme, however, a litigant must comply with judicial orders while seeking their alteration through the judicial process rather than acting unilaterally to ignore decrees with which it does not agree. E.g., Walker v. Birmingham, 388 U.S. 307 (1967). Because the defendants have ignored this fundamental principle, this Court should act promptly to protect the integrity of its judgments and proceedings. The injunctive relief which plaintiffs seek will serve to preserve the status quo pending a proper application to this Court by the defendants and the Court's determination on the merits of any such application.

Conclusion

For the foregoing reasons, plaintiffs respectfully submit that the Court should act promptly to vacate the January 6 stay and to grant them further injunctive relief necessary to enforce the declaratory judgment and prior injunctive decrees in this case. Because defendants have publicly announced their intentions to act quickly (for example, to revoke relevant Revenue Rulings and Procedures "forthwith"), we submit that the Court should also shorten the time for a response by defendants to the motion and schedule a hearing thereon at the earliest practicable opportunity.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al., Plaintiffs, v. DONALD T. REGAN, et al., Defendants.	)	CIVIL ACTION NO. 1355-69

ORDER

AND NOW, this _____ day of January, 1982, upon consideration of the Plaintiffs' Motion to Vacate Stay of Proceedings, to Shorten Time for Response Hereto, and for Further Injunctive Relief to Enforce Declaratory Judgment and Preserve the Status Quo, and of the entire record in this case, and for good cause, it is hereby

ORDERED that the stay of all proceedings in this matter entered by Order of this Court dated January 6, 1982 (pending the Supreme Court's decisions in Goldsboro Christian Schools, Inc. v. United States and Bob Jones University v. United States) be and the same hereby is VACATED; and it is further

ORDERED that the defendants (and defendant-intervenors, if they so desire) shall respond to the plaintiffs' Motion within three (3) days of the entry of this Order; and the Clerk of this Court is directed to give counsel for the parties telephone notice of the provisions of this Order; and it is further

ORDERED that a hearing on this motion shall be held on January _____, 1982, at _____ .m. in open Court.

_____
Hon. George L. Hart, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM H. GREEN, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 1355-69
DONALD T. REGAN, et al., Defendants.	)	

ORDER

AND NOW, this _____ day of January, 1982, upon consideration of the plaintiffs' Motion to Vacate Stay of Proceedings, to Shorten Time for Response Hereto, and for Further Injunctive Relief to Enforce Declaratory Judgment and Preserve the Status Quo, of the defendants' response thereto and the oral argument of the parties' counsel, and upon consideration of the entire record in this case, and it appearing to the Court that defendants have taken and publicly announced actions which violate the prior rulings in this case, and that further injunctive relief is necessary in order to preserve the integrity of the Court's judgments and to protect the plaintiffs' right to secure the relief previously awarded them by the Court, and that the ends of justice require such relief, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. Pending further Order of this Court after proper application by the defendants, the defendants are enjoined and restrained from taking any steps to revoke, or from failing to enforce Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Cum. Bull. 834; Rev. Proc. 75-231, 1975-1 Cum. Bull. 158; and Rev. Proc. 75-50, 1975-2 Cum. Bull. 587;

2. Pending further Order of this Court after proper application by the defendants, the defendants are enjoined and restrained from failing to enforce fully, or from taking any steps inconsistent with, the permanent injunction entered by this Court on June 30, 1971, as supplemented by this Court's Orders of May 5, 1980 and June 2, 1980, including but not limited to, any steps to restore the tax-exempt status of any private school in Mississippi which had its application for tax-exempt status denied, or whose tax-exempt status was revoked, by defendants or their predecessors in office on the basis of the declaratory judgment or injunctive decrees of this Court.

Hon. George L. Hart, Jr.
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 1982, I served a copy of the plaintiffs' Motion to Vacate Stay of Proceedings, to Shorten Time for Response Hereto, and for Further Injunctive Relief to Enforce Declaratory Judgment and Preserve the Status Quo, the Memorandum of Points and Authorities in Support Thereof, and the proposed Orders thereon, in Green v. Regan, Civ. No. 1355-69 (D.D.C.) upon counsel for the parties to that action, as follows:

By hand delivering a copy to the offices of:

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And by mailing a copy, Express Mail postage prepaid, addressed as follows:

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Norman J. Chachkin

Supplemental Amicus Brief

2

ON FILED
EB 17 1982

Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.
Petitioner,
v.
UNITED STATES OF AMERICA.

BOB JONES UNIVERSITY,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN JEWISH COMMITTEE, AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1 and 81-3

GOLDSBORO CHRISTIAN SCHOOLS, INC.
Petitioner,

v.

UNITED STATES OF AMERICA.

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN JEWISH COMMITTEE, AS *AMICI CURIAE*

Pursuant to Rules 36 and 42 of the Rules of this Court, the Lawyers' Committee for Civil Rights Under Law, NAACP Legal Defense and Educational Fund, Inc., American Civil Liberties Union, and American Jewish Committee (*"amici"*) move for leave to file the attached supplemental brief. In support of this motion, *amici* state as follows:

Each of the movants has already filed with this Court briefs on the merits of this litigation, all of which support the decisions of the court of appeals. Subsequent to the filing of these *amicus* briefs, the United States, on January 8, 1982, filed a Memorandum informing the Court that

> the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and employment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Ruluings that were relied upon to deny petitioners tax exempt status under the Code. [footnote omitted]

The Memorandum for the United States requested that the judgments of the court of appeals be dismissed as moot.

The question of mootness raised by the government's actions and Memorandum had not previously arisen in this litigation, throughout which the United States had consistently opposed tax-exempt status for the two schools. *Amici* therefore could not have foreseen the existence of this question at the time they filed their briefs, since that question arises from a government decision announced without prior notice and which overturned the long-established practice of the Internal Revenue Service.

Although supplemental briefs from *amici* are not usually entertained by the Court, this is an appropriate occasion for doing so. Despite the fact that the issue of mootness is of central importance to the disposition of

this litigation, and to the timely resolution of the underlying issues, none of the parties has yet analyzed it in their submissions to this Court.

Because of the pressing national importance of the issues presented in the pending cases, and the necessity that the mootness determination sought by the United States receive the most thorough consideration, we respectfully suggest that the filing of the annexed brief arguing that the cases are not moot will help to provide the essential adversarial arguments "upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Accordingly, *amici* respectfully request that their motion for leave to file the attached supplemental brief be granted.

Respectfully submitted,

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These cases raise important statutory and constitutional questions relating to the granting of tax-exempt status to racially discriminatory private schools. Although the cases arose as suits by petitioners for the return of certain disputed tax payments, these suits were simply a means, expressly suggested by this Court, for raising the underlying statutory and constitutional issues. *Bob*

Jones University v. Simon, 416 U.S. 725, 746 (1974). The fund-raising advantages resulting from the deductibility of contributions made to schools with tax-exempt status are far more important to petitioners than the particular sums for which they brought suit.

On January 8, 1982, the United States announced in a Memorandum filed with this Court that it would refund the disputed tax payments, had begun the process of granting or restoring petitioners' tax-exempt status, and was revoking the Revenue Rulings and Revenue Procedures pursuant to which that status had been withheld. Thus, as of January 8 it appeared that the United States intended to confirm to petitioners the tax-exempt status which these cases were commenced to obtain.

However, only 10 days later, the President announced that the government actually opposes granting tax-exempt status to petitioners and other racially discriminatory private schools and was submitting legislation to Congress to prevent this result. *See* Appendix to February 3, 1982 Supplemental Memorandum for the United States ("U.S. Supp. Mem. App.") in these cases, at 10a. The proposed legislation specifically provides that tax-exempt status will not be granted to any organization maintaining a school with racially discriminatory policies, even if those policies are religiously based (*id.* at 7a-8a) and would have an effective date of July 9, 1970, thus assuring that the specific taxes in dispute in these cases would have to be paid by petitioners (*id.* at 9a).

Moreover, at the same time the President declared that, pending Congressional action on the legislative proposal, the Internal Revenue Service would "not act on any applications for tax exemptions filed in response to the IRS policy announced on January 8" (*id.* at 11a). A Treasury Department release on the same date clarified this newest policy by making a *special exception* for the petitioners in these cases, who would be granted tax-

exempt status "as *required* by the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982" (*id.* at 12a) (emphasis added). Finally, the government has indicated that it is continuing to comply with injunctive decrees barring tax exemptions for racially discriminatory private schools located in Mississippi (*id.* at 2a, 3a, 13a-14a).

In these circumstances, the pending cases are not moot. It is well settled that "a voluntary cessation of the [tax] practices complained of could make this case moot only if it could be said with assurance 'that "there is no reasonable expectation that the wrong [denial of tax exemption] will be repeated."' *United States v. W.T. Grant Co.*, [345 U.S. 629,] 633 [(1953)]. Otherwise, '[t]he defendant is free to return to his old ways,' *id.*, at 632 . . . ." *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). The heavy burden upon parties arguing for dismissal as moot was summarized in *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968):

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." . . . A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Failure to satisfy this heavy burden will "prevent mootness because of the 'public interest in having the legality of the practices settled.'" *DeFunis v. Odegaard*, *supra*, 416 U.S. at 318, quoting *United States v. W.T. Grant Co.*, *supra*.[1]

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[1] *Accord*, Vitek v. Jones, 445 U.S. 480, 487 (1980); Gray v. Sanders, 372 U.S. 368, 375-76 (1963); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42-43 (1944); FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257, 260 (1938); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 308-10 (1897).

This heavy burden has not been met in these cases. It is anything but "absolutely clear" that the disputed withholding of tax-exempt status "could not reasonably be expected to recur." Indeed, the United States quite clearly intends to revert to its "old ways" by denying petitioners tax-exempt status in the future, and to that end is actively seeking to "prohibit tax exemptions for any schools that discriminate on the basis of race" (U.S. Supp. Mem. App. at 10a). Were the President's proposed legislation enacted, petitioners would have any newly restored or granted tax-exempt status revoked retroactively and would again be in the posture of having to sue the United States based upon the same constitutional challenges advanced in these proceedings.[2] Even if the legislation were not enacted, there is reason to believe that upon some other signal of agreement from the Congress, the government might resume its pre-January 8, 1982 stance with regard to the eligibility of racially discriminatory private schools for exemption.[3] In that event, petitioners again would lose their tax-exempt status and would again be suing the United States on the constitutional and statutory theories advanced in their briefs in these cases. Thus, the requisite showing that the controversy between the parties has quite clearly come to an end, and is highly unlikely to recur, simply has not been made.

The posture of these cases bears a striking resemblance to *Church of Scientology v. United States*, 485 F.2d 313 (9th Cir. 1973), where the government's offer to refund the Church's assessed tax deficiencies was held not to moot the Church's challenge to the government's denial to it of tax-exempt status. Noting that "the status of

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[2] The only change in petitioners' cases would presumably be that they would not be attacking the revocation of their tax-exempt status on statutory-interpretation grounds.

[3] *See, e.g.*, N.Y. Times, Feb. 4, 1982, at 1 col. 1 (city ed.) (administration "may accept" sense-of-Congress resolution in lieu of legislation).

[the Church] as an exempt organization is a continuing one . . . [which] recurs each year" (*id.* at 317) and that the government had indicated that it might dispute the Church's tax-exempt status in later years, the Court of Appeals relied upon the *W.T. Grant Co., supra*, line of cases as well as the decisions of this Court rejecting mootness claims where the controversy is "capable of repetition, yet evading review"[4] and ruled that the *Church of Scientology* case was not moot.

The mootness claim in these cases also approximates that made by the government in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). There, the plaintiffs attacked the policy of granting tax exemptions to racially discriminatory private schools on both constitutional and statutory grounds. After a preliminary injunction was issued, *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), the government voluntarily announced the policy which it has now sought in these cases to repudiate. On the basis of its voluntary announcement, it then asked that the lawsuit be declared moot. *See Green v. Connally, supra*, 330 F. Supp. at 1170. The three-judge district court correctly foresaw the possibility that a later national administration might not wish to adhere to the voluntarily adopted policy, thus depriving the plaintiffs of their rights. Is therefore rejected the claim of mootness:

> We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of

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[4] Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911); *accord*, Super Tire Engineering Co. v. McCorkle, 416 U.S. 155, 122 (1974); Roe v. Wade, 410 U.S. 113, 125 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969); *see* DeFunis v. Odegaard, *supra*, 416 U.S. at 318-19; *see also* Quern v. Mandley, 436 U.S. 725, 733 n.7 (1978); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 535 n.14 (1978).

> administration, or changing perceptions of sound discretion.

Id. at 1170-71. The soundness of this approach is demonstrated, eleven years later, by the government's unilateral abandonment of the very policy upon which its earlier claim of mootness had been based.

Green bears upon the present issue in another important sense. The declaratory judgment in that case, *see* 330 F. Supp. at 1179, *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971), interprets the Internal Revenue Code to bar federal tax exemptions for racially discriminatory private schools. The government concedes that it must continue to enforce that interpretation at least with respect to private schools in Mississippi (U.S. Supp. Mem. App. at 2a, 3a, 13a-14a); and renewed litigation in the *Green* case is now pending in the U.S. Court of Appeals for the District of Columbia Circuit on the question whether the declaratory judgment also binds the government as to private discriminatory schools outside Mississippi.[5] It is thus far from "absolutely clear" that the government is legally free to make refunds and to grant exemptions to the petitioners in these cases. Indeed, it would appear that the government cannot consummate the restoration of petitioners' tax exemptions and the refund of amounts previously paid under protest unless and until the judgments of the court of appeals are vacated.[6] Much the less may it be said that the United

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[5] The *Green* plaintiffs on January 13, 1982 sought injunctive relief from the district court to enforce the declaratory judgment on a nationwide basis. (The pleading reprinted in the United States' Supplemental Memorandum (U.S. Supp. Mem. App. at 1a-16a) was filed in response to the plaintiffs' motion.) On February 4 the district court ruled that the *Green* case was limited to Mississippi schools. Plaintiffs in *Green* have noticed an appeal and filed a request for emergency injunctive relief with the Court of Appeals, which is presently pending.

[6] *See* Bob Jones University v. United States, 639 F.2d 147, 155 (4th Cir. 1980) ("[t]he judgment of the district court is reversed

States has carried its "heavy burden" of showing that it "could not reasonably be expected to" reassert petitioners' tax liabilities. *See United States v. W.T. Garnt Co., supra*; *United States v. Concentrated Phosphate Export Ass'n, supra.*

The government has in fact made no attempt whatever to justify its request that the judgments below be vacated on the basis of mootness. It has filed no document in this Court explaining its January 1982 shifts in position. And, although some government officials have recently indicated in testimony before Congressional Committees that they disagree with the construction of the Internal Revenue Code underlying the court of appeals' decisions in the present cases (the same construction of the Code mandated by the *Green* declaratory judgment), the government has not sought to obtain from this Court a definitive interpretation of the Code.

Yet there is ample precedent under which the government could have proceeded in an orderly fashion rather than by seeking to moot these cases and avoid an authoritative judicial ruling. It could, for example, have "confessed error" on the statutory interpretation issue,[7] in which case this Court would have made an independent

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with instructions to dismiss the University's claim for refund of 1975 FUTA taxes, and to reinstate the government's claim for the years 1971 to 1975 and enter appropriate judgment thereon for defendant") (emphasis supplied). *Cf.* United States v. Munsingwear, Inc., 340 U.S. 36 (1950) (*res judicata* effect of unvacated judgment in case mooted prior to review by this Court). For this reason, the second part of the test for mootness applied by this Court in County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) ("complet[e] and irrevocabl[e] eradicat[ion of] the effects of the" challenged practice) has not been satisfied.

[7] There is no indication that the United States agrees with petitioners' position on the First Amendment questions in these cases; to the contrary, the proposed legislation (U.S. Supp. Mem. App. at 8a) indicates that the government rejects petitioners' First Amendment claims.

examination of the record before reaching a disposition. *See, e.g., Sibron v. New York*, 392 U.S. 40, 58-59 (1968); *Young v. United States*, 315 U.S. 257, 258-59 (1942); *see also Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969). Even if it had not "confessed error," the government was not obliged to defend the pre-1982 policy, but it could have argued with petitioners that the rulings below incorrectly construed the Code.[8] Had it done so, this Court could have appointed an *amicus curiae* to argue in support of the judgments below. *E.g., Brown v. Hartlage* (No. 80-1285), 50 U.S.L.W. 3300 (U.S., Oct. 19, 1981); *Cheng Fan Kowk v. Immigration & Naturalization Service*, 392 U.S. 206, 210 n.9 (1968); *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955); *cf. United States v. Lovett*, 328 U.S. 303 (1946). This avenue is still open in the instant cases and *amici* stand ready to assist the Court.

The fact that all of the parties appear to agree that these cases should be treated as moot is, of course, not controlling. It is the responsibility of the Court, and not the parties, to determine its jurisdiction,[9] and the Court should avoid even the appearance that its jurisdiction, once invoked, can be manipulated by parties seeking to avoid possibly unfavorable adjudication of fundamentally important issues such as are involved in these cases.[10]

As *amici* have demonstrated above, these cases involve a dispute still "live" in which each of the parties retains a "legally cognizable interest in the outcome." *Powell v.*

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[8] *See* note 7 *supra*.

[9] *See* Sosna v. Iowa, 419 U.S. 393, 398 (1975); Richardson v. Ramirez, 418 U.S. 24 (1974); Swift & Co. v. Hocking Valley R.R., 243 U.S. 281 (1917); South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892).

[10] *See* Utah Public Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969) (refusing to grant Rule 60 motion to dismiss appeal and holding that remand order of lower court failed to carry out prior mandate of this Court).

McCormack, 395 U.S. 486, 496 (1969). They involve issues of compelling national importance which will inevitably find their way to this Court and which ultimately must be decided by the Court. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 757 n.9 (1976). The questions have been framed with "the necessary specificity" and can be "contested with the necessary adverseness and . . . vigor," *Flast v. Cohen*, 392 U.S. 83, 106 (1968). The cases are, therefore, not moot and the government's suggestion to the contrary should be rejected. At the very least, in recognition of the post-January 8 modifications in the position of the United States and the substantial likelihood of significant further developments in the near future, resolution of the mootness question should be deferred until after the Court has heard oral argument on the merits.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the judgments of the court of appeals not be vacated as moot and that these cases be set down for oral argument on their merits. The Court may wish to request that the United States submit a brief and to invite an *amicus* of its choosing to file a brief in support of the judgments below and present oral argument.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF OF LAWRENCE E. LEWY IN SUPPORT OF AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to the Rules of this Court, Lawrence E. Lewy hereby moves to file the attached brief amicus curiae with respect to affirmance of the judgments of the court of appeals in these cases. Consent of petitioners has not been obtained, although sought by telephone and letter on behalf of a client. Consent was indicated orally by the Solicitor General and William T. Coleman, Jr., Esquire, invitee of the Court to brief and argue for affirmance.

Amicus is a member of the Bar of this Court, and the Bars of Virginia and Illinois, formerly served in Chief Counsel's office of Internal Revenue Service, a veteran of World War II and a member of the Board of Directors of American Veterans Committee Inc, an organization of veterans that has filed many amicus curiae briefs in landmark civil rights cases in this Court.

Amicus appears *pro se* and not as an authorized representative of any organization or government because of time constraints concerning official approval for submission of a brief.

The concern that impels the filing of this motion is the presenting of an argument on which no other party, as far as amicus is aware, has material made available to the undersigned for submission to this Court by officials of the Commonwealth of Virginia, or is prepared to advance these particular points.

Respectfully submitted,

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BRIEF OF LAWRENCE E. LEWY AMICUS CURIAE

THE ISSUE IN THIS CASE

This case raises the issue whether nonprofit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies or other racially discriminatory practices, qualify as tax exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, eligible to receive charitable contributions deductible by the donor under Section 170 of the Code.

THE INTEREST OF AMICUS IN THIS CASE

Amicus has been an active member of an organization of veterans who associated together to promote democratic principles for which they fought. Amicus believes that allowing tax exemption under Section 501(c)(3) of the Internal Revenue Code and deductibility of gifts under Section 170 to nonprofit corporations that discriminate on the basis of race constitutes affirmative goverment sanction of such discrimination contrary to the law and express policy of the United States and such states as have expressed their policy and procedure on the matter and constitutes subsidization of such discrimination by any government that sanctions such exemption and deductibility. Amicus further believes that adopting such a policy by the Federal Government contrary to the policy of such states which have decided themselves on the subject engenders confusion and inefficiency in the income tax cooperation between federal and state governments to the ultimate expense to all taxpayers of every state and the United States.

ARGUMENT

Amicus agrees with the major arguments advanced as stated in the draft brief transmitted for lodging by the Solicitor General on the request of the Clerk of this Court that:

> Nonprofit private schools that, on the basis of religious doctrine, practice racial discrimination, do not qualify as tax-exempt organizations under the Internal Revenue Code
>
> A. The Commissioner of Internal Revenue acted within his statutory authority in ruling that racially discriminatory private schools are not tax-exempt under Section 501(c)(3) and are therefore not eligible for charitable contributions deductible under Section 170

B. Congress intended to limit tax-exempt status under Section 501(c)(3) and eligibility to receive deductible charitable contributions under Section 170 to those organizations that are "charitable" at common law and therefore benefit society as a whole

C. A private school that practices racial discrimination does not qualify for tax exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170 because it is not organized and operated for "charitable" purposes as that term is understood at common law

D. Congress has repeatedly considered the Commissioner's statutory interpretation that racially discriminatory private schools are not tax exempt and has refused to alter it and, indeed, has made other statutory changes premised on the validity of that interpretation

E. The Commissioner's denial of petitioners' tax exemption because of their racially restrictive policies does not violate their right to free religious belief and exercise under the First Amendment

However, since able counsel for other *amici* as well as counsel invited by the Court will present such arguments in their briefs and oral argument, Amicus submits that it will serve the Court better by presenting a phase of the problem to the knowledge of Amicus, not considered by others in the case, and not reiterating the detailed arguments and authorities made by the others.

Amicus is a veteran who is a citizen of the United States, resident of the State of Virginia and member of the Bar of that state. Virginia, like many other states, cooperates very closely with the Internal Revenue Service with regard to coordination of the state income tax assessment and collection system with the federal system. The device has been called "piggy backing". There are

several agreements between the Internal Revenue Service and the state involving exchange of information between the state's tax agency and the Internal Revenue Service. Virginia depends on the Internal Revenue Service procedures, interpretations and rulings on such matters as charitable exemptions and deductibility of charitable donations.

Because of the problems involved, Virginia issued an Emergency Regulation effective April 15, 1982, reproduced here verbatim which speaks for itself:

[SEAL]

COMMONWEALTH OF VIRGINIA
Department of Taxation
Richmond, Virginia 23282

EMERGENCY REGULATION

Effective date:	April 15, 1982
Expiration date:	Upon adoption of permanent regulations, or upon the finding that an emergency no longer exists or April 14, 1983, whichever is the earliest.
Supersedes:	All previous documents and any oral directives in conflict herewith.
References:	Sections 58-151.03(c), 58-151.013 (d)(1), Code of Virginia
Authority:	Sections 58-48.6, 9-6.14:6, Code of Virginia
Scope:	Applicable to all taxpayers subject to Virginia income tax.
Purpose:	This emergency regulation sets forth the standard which the Virginia Department of Taxation has applied since January 1, 1972 and will continue to apply to determine

Purpose—cont'd

the tax exempt status of schools having a racially discriminatory policy and the deductibility of contributions to such schools.

Background:

Until recently the Internal Revenue Service and the Virginia Department of Taxation applied the same standard in determining whether a school having a racially discriminatory policy qualified as a charitable institution exempt from income tax. This standard was set forth in I.R.S. Revenue Ruling 71-447, 1971-2, C.B. 230 and Revenue Procedure 75-50, 1975-2, C.B. 587.

On January 8, 1982 the U.S. Treasury announced that it was suspending enforcement of Revenue Ruling 71-447 and Revenue Procedure 75-50 in requests for exempt status made by schools having a racially discriminatory policy. However, Virginia continues to enforce the standard set forth in Revenue Ruling 71-447 and Revenue Procedure 75-50, until such time as they may be revoked. This emergency regulation incorporates that standard and the procedures which will be used by the Department of Taxation to enforce the standard.

Section 58-151.01(a) of the Code of Virginia provides: "Any term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a dif-

Background—cont'd

ferent meaning is clearly required."

The Commissioner has determined that certain terms used in Sections 58-151.03(c) and 58-151.013 (d)(1) clearly require meanings different from those in the laws, regulations, rulings and procedures of the United States as applied by the Internal Revenue Service after January 8, 1982.

The Commissioner has also determined that an emergency exists because the Internal Revenue Service may issue exemption letters at any time to schools having a racially discriminatory policy. The fact that a school may be exempt from federal income tax may mislead it and its contributors to assume that similar tax treatment will be granted under Virginia law. Accordingly, this emergency regulation is issued pursuant to the emergency procedures prescribed by the Administrative Process Act and shall be effective until a permanent regulation on this subject is adopted, until the Commissioner finds that the emergency no longer exists, or until April 14, 1983, whichever is the earliest. The Department of Taxation will receive, consider, and respond to petitions by any interested person at any time for the reconsideration or revision of this emergency regulation.*

* Amicus has been advised by the Attorney General of Virginia that no person has asked for reconsideration or revision of the Emergency Regulation.

Regulation: The term "religious, educational, benevolent and other corporations not organized or conducted for pecuniary profit which by reason of their purposes or activities are exempt from income tax under the laws of the United States" in Section 58-151.03(c) shall not include schools having a racially discriminatory policy even though such schools may not be subject to federal income tax.

In addition, the term "the amount allowable for itemized deductions for federal income tax purposes," as used in Section 58-151.013 (d)(1) shall not include the amount of contributions to schools having a racially discriminatory policy even though such amount may have been deducted and allowed for federal income tax purposes.

A school has a racially discriminatory policy if it fails or refuses to admit the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school or if the school discriminates on the basis of race in the administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs. The term "racially discriminatory policy" shall not include an admissions policy at a school, or a program of religious training or

Regulation—cont'd

worship of a school, that is limited, or grants preferences or priorities, to members of a particular religious organization or belief, provided that no such policy, program, preference or priority is based upon race or upon a belief that requires discrimination on the basis of race.

If the Commissioner, upon hearing, determines that a school has a racially discriminatory policy such school shall not be exempt from Virginia income tax and, in addition, no contributions to such school shall be allowed as a deduction in computing Virginia taxable income. The Commissioner may, in his discretion, allow the deduction of contributions to such school which were made prior to the date of determination that the school has a racially discriminatory policy, or such other date he may determine to be equitable.

Approved for issuance under the emergency procedures prescribed by Section 9-6.14:6(iii) of the Code of Virginia (1950), as amended, of the Administrative Process Act this 15 day of April, 1982.

/s/ Charles S. Robb

CHARLES S. ROBB
Governor

Adopted this 15 day of April, 1982

/s/ W. H. Forst

W. H. FORST
State Tax Commissioner

As Virginia's Emergency Regulation states, the Virginia Department of Taxation followed the same standard as the Internal Revenue Service to determine whether a school's racially discriminatory policy prohibited it from qualifying as a charitable institution exempt from income tax and one which had gifts to it considered deductible as charitable contributions. The Commonwealth had interpreted the law consistently with the way the Internal Revenue Service had.

For over ten years the Service had denied exemption and eligibility to receive gifts counted as charitable deductions to organizations like the petitioners herein. The Service position and the background for it is explained by former Commissioner Randolph Thrower. See *Statement By Randolph W. Thrower before the Ways and Means Committee on the Tax Exempt Status of Racially Discriminatory Private Schools, The Tax Lawyer*, Vol. 35, No. 3., pp. 701-713.

Virginia issued the Emergency Regulation because of the problems of inconsistent interpretation engendered by reversal of the Internal Revenue Service position and to make sure that its citizens and taxpayers would understand its position that permitting tax exemption or tax exemption for gifts to racially discriminatory schools was contrary to its policy. Virginia, once a bastion of "massive resistance", is now completely consistent with the teachings of this Court, and announced this policy so it would be clear to all. No person has asked the state to reconsider its policy as provided in its regulations.

Government subsidization by a state or the United States through tax exemption to schools that deny equality of education opportunity on the basis of race denies the principles for which citizens have served this country.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted:

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Nos. 81-1 and 81-3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

BOB JONES UNIVERSITY,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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INTEREST OF AMICUS

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a nonprofit corporation established under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of race discrimination issues in the field of education and government sponsorship of education. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958); Norwood v.

Harrison, 413 U.S. 544 (1973). The parties have consented to the filing of this brief and letters of consent are appended to this brief.

QUESTION PRESENTED

Is an educational institution, conferring secular degrees, whose racially discriminatory policies are motivated by religious belief, barred from governmental support (in the form of tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 and eligibility for receipt of tax deductible contributions under Section 170(c)(2)) which is denied similar institutions lacking religious motivation?

SUMMARY OF ARGUMENT

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. as amicus curiae, supports the Government's position that nonprofit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies and other racially discriminatory practices, do not qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954 and that donations to such corporations do not qualify as deductible charitable contributions under Section 170(c)(2).

As the Government urged,[1] and

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1 Nos. 81-1 and 81-3, Brief for the United States on Petitions for Writs of Certiorari ("Government's Cert. Brief"), at 11.

as the Court of Appeals for the Fourth Circuit held,[2] the Internal Revenue Service acted within its statutory authority in denying Bob Jones University ("Bob Jones") and Goldsboro Christian Schools, Inc. ("Goldsboro") the claimed tax benefits. Educational institutions (including religious institutions performing secular education functions) that racially discriminate in violation of public policy are not eligible for tax exemption and deduction support. (The status of Sunday schools, seminaries or similar non-secular religious schools is not here at issue.) Even if discriminatory practices are the

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2 Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd without published opinion (4th Cir. 1981) (No. 81-1, Petition for a Writ of Certiorari, at 1a.)

outgrowth of sincere religious faith, the schools' unquestioned First Amendment right to adhere to religiously motivated racist beliefs does not entitle them to a governmental benefit denied secular or religious schools which derive their racism from sources other than religious mandate.[3]

Indeed, we believe that any governmental support, direct or indirect,[4] of Bob Jones and Goldsboro would violate the First, Fifth and Thirteenth Amendments to the Constitution, as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. While it is unnecessary to

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3 Government's Cert. Brief at 13; Bob Jones University v. United States, supra, 639 F.2d at 150.

4 Such basic services as police and fire protection, which are provided as a matter of general community interest, are, of course, distinguishable.

reach these issues since Section 501(c)(3) and Section 170(c)(2) statutory grounds are sufficient to affirm the Fourth Circuit's decision, the constitutional dimension of the public policy underlying the statutory interpretation cannot be overemphasized. The eradication of racial discrimination, particularly in education, is on the highest constitutional plane and must ordinarily prevail even when balanced against other constitutional rights.

ARGUMENT

I. THE I.R.S. WAS BOUND BY, AND CORRECTLY APPLIED, GREEN v. CONNALLY TO DENY TAX EXEMPT STATUS TO BOB JONES AND GOLDSBORO

This is not a case of capricious frolic by the Internal Revenue Service ("IRS") into the realm of social policy. A decade ago, in Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), this Court affirmed a declaratory judgment that:

> A. Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.
>
> B. As used in this Order, the term "racially nondiscriminatory

> policy as to students" means that the school or other educational institution admits the students of any race to all the rights, privileges, programs and activities generally accorded or made available to students at that school, and which includes, specifically but not exclusively, a policy of making no discrimination on the basis of race in administration of educational policies, applications for admission, of scholarship and loan programs, and athletic and extracurricular programs.

In Green, the parents of black Mississippi school children sought an injunction against the IRS approving any Section 501(c)(3) exemptions or Section 170(c)(2) deductions[5] with respect to

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5 Section 501(a) exempts from federal income tax organizations described in subsection (c). Section 501(c)(3), quoted in pertinent part, includes:

> Corporations ... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,

(Footnote Continued)

Mississippi private schools discriminating against black students.[6] In

---

5 (Footnote Continued)

> ... no part of the net earnings of which enures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation....

Pursuant to § 170(a) charitable contributions are allowed as a deduction in computing taxable income. Section 170(c)(2), quoted in pertinent part, defines a charitable contribution as a contribution to:

> A corporation ... organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes ...

Similar deductions for estate and gift tax purposes are created by §§ 2055 and 2522.

6 While § 501(c)(3) exempt status confers a substantial benefit on organizations because it means their exempt purpose income and passive

(Footnote Continued)

granting the requested relief,[7] the three-judge court described the combined

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6 (Footnote Continued)

investment income will not be subject to tax, qualification under § 170(c)(2) is of far greater significance. Organizations meeting the requirements of § 170(c)(2) are able to advertise to potential donors that their contributions will result in a tax deduction, obviously a great inducement to contribute to an or ganization so qualified. Thus if a donor subject to the 50% marginal rate could afford to make a gift of $50 after taxes to an organization, where the intended recipient qualifies as a § 170(c)(2) organization, the donor can give $100 because his after tax cost is only $50. Economically there is little distinction between this form of government support and a direct grant of $50. See, Wright v. Regan, 656 F.2d 820, 822 n. 1 (D.C. Cir. 1981).

7 The IRS had already adopted the Court's interpretation of §§ 501(c)(3) and 170(c)(2) on a nationwide basis after issuance of a preliminary injunction in Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), relating to certain Mississippi schools.

effect of Sections 501(c)(3) and 170(c)(2) as "in the nature of a matching grant," 330 F. Supp. at 1164-1165, and found further that these benefits "mean a substantial and significant support" to a pattern of segregation. Id. at 1155, citing Green v. Kennedy, supra, 309 F. Supp. at 1134. After reviewing the legislative history and historical antecedents of Section 501(c)(3), the court held:

> The case at bar involves a deduction given to reduce the tax burden of donors, a meaningful, though passive, matching grant, that would support a segregated school pattern if made available to racially segregated private schools. We think the Government has declined to provide support for, and in all likelihood would be constitutionally prohibited from providing tax-exemption- and deduction support for, educational institutions promoting racial segregation. Green v. Connally, supra, 330 F. Supp. at 1169 (footnote omitted).

Moreover, the court emphasized that the ultimate basis of its holding was federal public policy,[8] which is not dependent upon possible future changes in the common law of charitable trusts on which the IRS had predicated its then recent position that an educational institution must be "charitable" in the common-law sense, in order to qualify under Sections 501(c)(3) and 170(c)(2).

---

8 This Court has long recognized that the propriety of a deduction "depends upon legislative grace; and only as there is a clear provision therefor can any particular deduction be allowed." New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). Commissioner v. National Alfalfa Dehydrating, 417 U.S. 134, 148-149 (1974). Further, this legislative grace does not encompass deductions that would have the effect of frustrating sharply defined public policy, e.g., Hoover Motor Express Co., Inc. v. United States, 356 U.S. 38 (1958); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

Accordingly, the court reasoned that a racially discriminatory school would not qualify under this standard. The court relied upon a broader and more permanent rationale than the Commissioner of Internal Revenue had espoused:

> The Commissioner advised a committee of Congress that the new interpretation of the Code is based upon the common law of charities, and that the IRS impliedly finds that private schools which practice racial discrimination are not "'charitable' in the common-law sense." Even if the Service had not claimed complete administrative discretion to change its interpretation once again, it might have claimed the authority and even the necessity of modifying its 1970 interpretation in the light of some future changes in or reevaluation of the common law of charitable trusts. Plaintiffs are entitled to more definite and assured relief than that provided by a reading of the Code based on the evolution of state law doctrines. As we have indicated, the ultimate reason why the Code will not support tax exempt status and deductibility of contributions for such schools is based on Federal public policy.

> The declaratory paragraphs in our decree provide more enduring relief than the 1970 declarations of the Service, and it is relief to which plaintiffs are entitled. Id. at 1171 (footnote omitted) (emphasis added).

The court expressly declined to become enmeshed in the intricacies of the IRS' reliance upon charitable trust law, although noting that there is "at least a grave doubt whether an educational organization that practices racial discrimination can qualify as a charitable trust under general trust law." Id. at 1157. Rather, it relied upon "the general and well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy." Id. at 1161. The policy here implicated was "federal public policy against support for

racial segregation of schools, public or private":

> The sources and evidences of that Federal public policy are various. Perhaps the ultimate source is the strife-sprung national policy against slavery, culminating in its abolition in the Thirteenth Amendment. The Enabling Clause of that Amendment is a constitutional source for Congressional legislation "for abolishing all badges and incidents of slavery." Civil Rights Cases, 109 U.S. 3, 20, 3 S.Ct. 18, 28, 27 L.Ed. 835 (1883).
>
> The constitutional strength of the government's interest in preventing even private racial discrimination is underscored by the recent decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), interpreting the Civil Rights Act of 1866, 42 U.S.C. §1982, wherein that interest was held to prevail over the ordinary liberty of a citizen to buy and sell land and other property. Cf. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

The policy against racial segregation in education was broadly proclaimed as to public education by the states in the historic decision in Brown v. Board of Education, 347 U.S. 483, 74 U.S. 686, 98 L.Ed. 873 (1954). That was a seminal case and it has had numerous progeny, the latest to issue being Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). In Bolling v. Sharpe, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954), the companion case to Brown applying the prohibition against state school segregation to the Federal Government through the Fifth Amendment, the Supreme Court declared, "Segregation in public education is not reasonably related to any proper governmental objective * * *."

The national policy against support for segregated education emerged in provisions adopted by the Congress in the Civil Rights Act of 1964, 42 U.S.C. §§2000c to 2000d-4 (1964). . . .

Id. at 1163.

While finding it unnecessary to adopt a constitutional basis for its holding, the Green court emphasized that a contrary view would raise "serious constitutional questions" and refused to distinguish "indirect" tax exemptions and deductions from constitutionally infirm "direct financial aid to schools practicing racial discrimination." Id. at 1164-65. This construction of the tax statutes adopted by the Green court fully comports with this Court's rule that "federal statutes are to be so construed as to avoid serious doubt of their constitutionality." International Association of Machinists v. Street, 367 U.S. 740, 749 (1961).

Although the IRS had changed its construction of the relevant Code provisions during the pendency of Green, the

court felt that permanent injunctive relief was required to establish that the new interpretation was statutorily mandated, rather than discretionary:

> If defendants' construction were discretionary, it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion.
>
> Our decree will have no declaration of constitutional rights, but rather a declaration that the Internal Revenue Code requires a denial of tax exempt status and deductibility of contributions to private schools practicing racial discrimination. Green v. Connally, 330 F.Supp. at 1170-1171.

To the extent that the Fourth Circuit's present opinion can be read as holding merely that the IRS acted within its discretion in denying tax-exempt status

to Bob Jones and Goldsboro,[9] we urge that the Supreme Court once again -- as it did by affirming Green -- find that such denial

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9 Bob Jones University v. United States, supra, 639 F.2d at 152. While the Government's Cert. Brief at 12, recites only that the IRS "acted well within its statutory authority in concluding that a 'religious' organization such as petitioners must satisfy the 'charitable' requirement of Section 501(c)(3) in order to qualify for tax exemption," the Government's Fourth Circuit brief in Bob Jones, at 16, made clear the Government's unqualified support of Green: "It follows ... as held by the Green court and reaffirmed in Goldsboro ... that granting the less direct federal tax benefits to racially discriminatory schools would contravene public policy. Federal tax collectors take the full measure of federal exactions from black as well as white citizens. Fundamental fairness dictates that the charitable tax benefits, which are designed as a substitute for governmental expenditures, not be allowed to help sustain those institutions which engage in racially discriminatory educational programs. Any other interpretation of the tax statute would, as the Green court held, raise serious Fifth Amendment questions."

was statutorily, if not constitutionally mandated.[10] Indeed, the correctness of

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10 The Green case went up to this Court in 1971 upon the direct appeal of intervenors claiming to represent private schools affected by the three-judge court's order. These intervenors briefed many of the same points raised in the instant case, framing issues inter alia going to the district court's holdings "that withdrawal of federal tax exemptions from private white schools does not abridge the constitutional freedom of parents," and "that a 'federal public policy' having 'Constitutional ingredients' governs the applicability of the tax laws," and "that there is such a present federal public policy to discourage the continuance of private white schools." Coit v. Green, supra, Intervenors' Jurisdictional Statement on Appeal. In response, the Government questioned intervenors' standing to assert the class action claims they had raised. Id., Government's Motion to Dismiss at 5-8. Yet, rather than dismissing the appeal, this Court affirmed the order below, in effect confirming the district court's view that the Government's policy change neither mooted the proceedings nor gave the plaintiffs the relief to which they were entitled.

(Footnote Continued)

Green's statutory construction is even

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10 (Footnote Continued)

Moreover, in a predecessor case to that before the Court today, Green was cited as support for the proposition that Bob Jones' contentions with respect to its alleged entitlement to tax-exempt status despite its religiously motivated racially discriminatory practices were "sufficiently debatable to foreclose any notion that 'under no circumstances could the Government ultimately prevail.'" Bob Jones University v. Simon, 416 U.S. 725, 749 (1974). Although this Court noted in Simon that the Coit affirmance "lacks the precedential weight of a case involving a truly adversary controversy," Id., at 740 n.11, as the excerpts quoted above demonstrate, the recent characterization of the affirmance as a situation where "no controversy remained" misses the mark. Prince Edward School Foundation v. United States, 450 U.S. 944, 945 n.1 (1981) (Rehnquist, J., dissenting from denial of certiorari). As the District of Columbia Circuit noted recently in Wright v. Regan, supra, 656 F.2d at 823, 832 n.29 (a successor/companion case to Green): "a sharp adversary contest remained ... [following the

(Footnote Continued)

more apparent today than a decade ago. In the interim, Congress has explicitly adopted the rationale of Green's statutory construction of Section 501(c)(3). In 1976, Pub. L. 94-568, 90 Stat. 2697, added Section 501(i) of the Internal Revenue Code to deny tax-exempt status to racially discriminatory social clubs. The Senate Report in support of that bill approvingly cited, and followed, Green's holding to

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10 (Footnote Continued)

> IRS change of position] between plaintiffs and intervenors, a class of parents and children who supported or attended private schools in Mississippi with an enrollment limited to members of the white race.... It should be noted ... that the plaintiffs sought and obtained relief in Green beyond the measures the Service agreed to take. See, 330 F. Supp. at 1170, 1174-77. More significantly, the intervenors who appealed to the Supreme Court in Green remained uncompromisingly adverse to the plaintiffs."

the effect that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))."[11]

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11 S. Rep. No. 94-1318, 94th Cong., 2d Sess., at 7-8 and n.5 (1976), reprinted in [1976] U.S. Code Cong. & Adm. News 6051, 6058. Pub. L. 94-568 added § 501(g) (since redesignated § 501(i)):

> (i) an organization which is described in subsection 501(c)(7) [social clubs] shall not be exempt from taxation under subsection (a) for any taxable year, if at any time during such taxable year the charter, by-laws or other governing instrument of such organization or any written policy statement of such organization contains a provision which provides for discrimination against any person on the basis of race,

(Footnote Continued)

Moreover, post-Green judicial

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11 (Footnote Continued)

color, or religion. .

The Finance Committee Report, S. Rep. No. 94-1318, indicates that the purpose of this amendment was to extend to private social clubs the holdings of Green and McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972). In McGlotten, plaintiff brought a class action to enjoin the IRS from granting tax benefits to fraternal orders and social clubs that excluded non-whites from membership. Finding that the "tax deduction for charitable contributions is a grant of federal financial assistance within the scope of the 1964 Civil Rights Act" and that the exemption from taxation for fees and passive investment income "operates in fact as a subsidy in favor of the particular activities these groups are pursuing," the three-judge court enjoined the extension of the challenged benefits to racially discriminatory fraternal orders, but found the benefits granted to private clubs to be a matter of general policy having merely an effect of refraining from taxing the fees which members charged themselves for use of the facilities.

(Footnote Continued)

decisions -- including several decisions of this Court -- further establish the broad constitutional dimensions of the public policy against government support of racially segregated schools. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973) (state loans of textbooks to students at racially segregated private schools unconstitutional); Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (exclusive temporary use of public recreation facilities by segregated private schools unconstitutional); Runyon v. McCrary, 427 U.S. 160 (1976) (racial denial of admission to private commercially operated nonsectarian school violative

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11 (Footnote Continued)

Id. at 462. Pub. L. 94-568 thus approved and further extended McGlotten's rationale.

of 42 U.S.C. § 1981); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (expulsion of white student from sectarian school for interracial relationship with classmate held violative of 42 U.S.C. § 1981 where no sincere religious belief for expulsion present); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), cert. denied 434 U.S. 1063 (1978) (racial denial of admission to private church-affiliated sectarian school violative of 42 U.S.C. § 1981 where no sincere religious belief found).

Aside from the economic benefit that would inure to petitioners and their donors if Section 501(c)(3) status were granted, the significance of apparent government encouragement and approval of racially segregated schools cannot be

understated. At least since Brown v. Board of Education, 347 U.S. 483 (1954), this Court has understood that a "feeling of inferiority" is generated and enhanced in impact by government sanction of racial exclusion in education at any level. This fostering of a public perception that private discrimination has the sanction or approval of the government is itself a matter of constitutionally significant dimension. Gilmore v. City of Montgomery, supra, 417 U.S. at 582 (White, J. concurring); Reitman v. Mulkey, 387 U.S. 369, 375-377 (1967); McGlotten v. Connally, supra, 338 F. Supp. at 454.

Especially in the area of education, a quarter of a century of this Court's constitutional precedent emphatically rejects all forms of government complicity in segregation. "State

support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."

Cooper v. Aaron, 358 U.S. 1, 19 (1958).

II. THERE IS NO BASIS FOR AN EXEMPTION FROM GREEN v. CONNALLY FOR EDUCATIONAL INSTITUTIONS WHICH RACIALLY DISCRIMINATE THROUGH RELIGIOUS MOTIVATION

There is no statutory, public policy or constitutional ground for creating an exemption from Green for educational institutions whose racially discriminatory practices are religiously motivated. Indeed, while it is not necessary to reach such a holding in the present case, any such exemption would itself be unconstitutional.

In 1975, the IRS issued Rev. Proc. 75-50, 1975-2 C.B. 587, and Rev. Rul. 75-231, 1975-1 C.B. 158, which made clear that Green applies to private religious schools with policies of racial discrimination whether or not religiously

motivated.[12] The Senate Report with respect to Section 501(i), referred to supra at 23, came a year later than these guides but expressed no disapproval of them. Rather, Congress took no action -- as, indeed, it constitutionally could not have -- to grant racially discriminating religious schools a preferred status.[13]

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12 See infra, at 39-43. Whether a religious school can discriminate on grounds of religion was not addressed by the IRS and need not be reached by this Court in the present case. It can be suggested, however, that the Government's overriding interest against racially segregated schooling stands upon higher constitutional ground than the arguable right of attendance at a religious school not of one's own faith.

13 Cf. Congress' amendment of § 501(i) again in December 1980 to provide that the prohibition against discrimination by social clubs on religious grounds shall not apply to an auxiliary of a fraternal beneficiary society that limits membership to members of a particular religion, or "a club which

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Indeed, the IRS' 1975 interpretations have been cited with approval in the floor debate on Representative Ashbrook's amendment to the Treasury Department Appropriations Act of 1980, 92 Stat. 562, to bar IRS enforcement of a proposed revenue procedure concerning

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13 (Footnote Continued)

in good faith limits its membership to the members of a particular religion in order to further the teachings or principles of that religion, and not to exclude individuals of a particular race or color." Clearly, when Congress wanted carefully and constitutionally to create a rule of special applicability to religious-affiliated entities under § 501, it knew how to do so. Where Congress' attention had been focused on § 501 and Green by McGlotten and the two subsequent amendments of § 501(i), the absence of Congressional action to accord tax-exempt status to schools discriminating racially through religious motivation can be read as expressing Congressional policy that all private schools be treated alike under Green.

race discrimination by private secular and religious schools that created certain presumptions based on a numerical impact analysis.[14] Mr. Ashbrook himself stated:

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14 125 Cong. Rec. H5879 (daily ed. July 13, 1979). The Ashbrook Amendment was directed at the 1978 revenue procedures, proposed 43 Fed. Reg. 37296 (August 22, 1978), revised 44 Fed. Reg. 9451 (February 13, 1979). The Congressional bar on the enforcement of these 1978 standards, which in effect created an impact test for determining tax-exemption eligibility for private schools, in no way impugned the 1975 intentional discrimination standards, which fully govern the case herein. Indeed, the debate indicates that Congress viewed the 1975 procedures as necessary and appropriate. Representative Ashbrook remarked, "My colleague surely knows that existing revenue procedure 75-50 would be in effect, they can continue to review, they still impose detailed record-keeping requirements on the schools... As I pointed out, under their current regulation... they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax-exempt status. I am not trying to take that away." 125 Cong. Rec. at H5882. Thus, both Goldsboro's

(Footnote Continued)

> My amendment very clearly indicates on its face that all the regulations in existence as of August 12, 1978, would not be touched.[15]

Similarly, Representative Campbell conceded:

> While I oppose on principle efforts by the IRS, a tax-gathering organization, to make public policy, I cannot argue with the actual effect of the 1975 declaration.[16]

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14 (Footnote Continued)

argument that the Ashbrook Amendment indicates "that the issue of tax-exempt status of private, religious or church operated schools which maintain racially discriminatory policies is a matter to be resolved by Congress and not by the IRS," (Goldsboro Brief, at 28) and the comparable contentions in Judge Widener's dissent below, 639 F.2d at 160-161, are misleading. As to schools found to be practicing intentional discrimination, Congress if anything approved the IRS enforcement effort and the Green holding.

15 125 Cong. Rec. H5882 (daily ed. July 13, 1979).

16 125 Cong. Rec. H5881 (daily ed. July 13, 1979).

While difficult questions may sometimes be presented as to whether an institution's purposes are charitable or otherwise in accord with public policy,[17]

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17 For example, this Court grappled with thorny issues surrounding the exemption from local real property taxation afforded churches in Walz v. Tax Commission, 397 U.S. 664 (1970). There, the majority turned away on Establishment Clause challenge, recognizing the significant practical economic benefit afforded by the exemption but deeming the resultant church/state involvement sufficiently minimal and remote to withstand attack. In separate concurrences, Justice Brennan placed more weight upon the longstanding historical tradition of the exemption for church property, and Justice Harlan emphasized the broad class of voluntaristic charitable endeavors intended to be benefitted by the challenged exemption as evidence of its neutrality. Whether tax-exempt status can be denied churches whose membership policies or rituals discriminate against blacks is a serious question not before the Court today. While certain kinds of indirect governmental assistance to religion may survive Establishment Clause scrutiny, we submit that even indirect assistance to racial

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the present case is an easy one. Green has already held that the grant of tax benefits to racially discriminating schools would violate constitutionally-based public policy of the highest importance. Given

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17 (Footnote Continued)

discrimination in education (even where religiously motivated) is impermissible as a matter of public policy and constitutional law. It has been held that, under established precedent, a lesser degree of government assistance violates Title VI of the Civil Rights Act of 1964 than would violate the Establishment Clause. See, Bob Jones University v. Johnson, 396 F. Supp. 597, 605 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1979), citing Norwood v. Harrison, supra, and Board of Education v. Allen, 392 U.S. 236 (1968), and holding that inasmuch as Walz deals primarily with entanglement issues it is inapposite. Further, to the extent that Walz relies upon historical and common law concepts of voluntarism, it provides an analogy supportive of the government's position herein.

the unique nature of the affected public interest -- "abolishing all badges and incidents of slavery" -- it seems, on any conceivable balancing test, that even other constitutional rights would be, if necessary, subordinated.[18] Where religious institutions or individuals have ventured into the secular world to establish educational institutions granting secular

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18 While the states cannot lend school books to students attending racially segregated schools, Norwood v. Harrison, supra, book loans can be made to parochial school students, Board of Education v. Allen, supra. Because of the different public policies implicated, this Court has recognized that government support to racially discriminatory and religiously discriminatory educational institutions cannot be glibly equated; carefully circumscribed accommodations of church and state under the Establishment Clause should not be used as a basis for bootstrap arguments for Government subsidies to segregated schools. Norwood v. Harrison, supra, 413 U.S. at 465 n.7.

degrees,[19] the denial of all government aid (whether grants or tax benefits) to those violating the constitutionally mandated public policy in favor of integrated schools, regardless of their motivation, is statutorily -- if not constitutionally -- compelled.[20]

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19 A different rule might obtain for religious educational institutions not offering secular degrees, but those are not the present facts.

20 It is not necessary to reach the issue of whether an action for damages or injunctive relie would lie under 42 U.S.C. § 1981 against an educational institution discriminating through religious motivation. The question of government subsidization of racial discrimination presented on this appeal is an easier one, not involving the use of the compulsory powers of government to change conduct. On this same basis, any implication that, for purpose of the Free Exercise Clause balancing test, § 1981 would clearly be the less intrusive alternative (Goldsboro Brief at 42-43), must be rejected as simplistic and on the present facts incorrect. [Note,

(Footnote Continued)

Any fear that the IRS will abuse its discretion to deny Section 501(c)(3) exemptions in violation of First Amendment rights if a public policy rationale is endorsed in this case is a presently unwarranted imputation of bad faith. As administration of Section 501(c)(3) has demonstrated during the decade since Green, exemptions have been denied for conduct violative of constitutional values, not for mere speech. Should administrative abuses occur, they are remediable through the judicial process. Moreover, Section 501 and its administration is an area particularly open to public view and to

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20 (Footnote Continued)

however, that even under § 1981 the right to hold and promote racist beliefs is protected. Runyon v. McCrary, supra, 427 U.S. at 176.]

Congressional scrutiny, debate and remedy. See, 30-33, supra.

While Bob Jones and Goldsboro allege that the denial of Section 501(c)(3) status interferes with the free exercise of their religious beliefs, any impact is merely the incidental result of the "benevolent neutrality"[21] mandated by the Establishment Clause. While "religious institutions need not be quarantined from public benefits that are neutrally available to all," Roemer v. Maryland Public Works Bd., 426 U.S. 736, 746 (1976), they have no preferred claim to benefits denied similarly situated secular institutions.

This Court's recent decision in Heffron v. International Society for

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21 Walz v. Tax Commission, supra, 397 U.S. at 676.

Krishna Consciousness, Inc., ___ U.S.___, 69 L.Ed.2d. 298 (1981), is instructive on the issue of disproportionate impact on one religious sect of a religion-neutral regulation of general applicability. In Heffron, a "booth rule" confining distribution, sales and solicitation activities at the Minnesota State Fair to fixed locations was upheld as a valid exercise of the police power to protect the state's interest in maintaining the orderly movement of crowds as a matter of safety and convenience. A decision of the Minnesota Supreme Court, holding that the booth rule, as applied, unconstitutionally restricted the Krishna's religious practice of a peripatetic solicitation ritual known as Sankirtan was reversed on a rationale applicable to the present appeal:

> As we see it, the Minnesota Supreme Court took too

narrow a view of the State's interest in avoiding congestion and maintaining the orderly movement of fair patrons on the fairgrounds. The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature. Id. at 309-310 (emphasis added).

This holding, as explicated by Justice Brennan's concurring opinion,[22] goes far toward resolving the present case. In Heffron, all solicitors --

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22 "Our cases are clear that governmental regulations which interfere with the exercise of specific religious beliefs or principles should be scrutinized with particular care. See, e.g., Sherbert v. Verner, 374 U.S. 398, 402-408 (1963). As we stated in Wisconsin v. Yoder, 406 U.S. 205, 220 (1972), 'there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.' I read the Court as accepting these precedents, and merely holding that even if Sankirtan is 'conduct protected by the Free Exercise Clause,' it is entitled to no greater protection than other forms of expression protected by the First Amendment that are burdened to the same extent by Rule 6.05." Id. 69 L.Ed.2d at 314 n.3.

those obeying a religious mandate to solicit peripatetically, those soliciting for religious or other charitable causes, and those soliciting for commercial purposes -- are equally subject to a neutral regulation aimed at a valid public purpose.

In this case, we urge that all private schools -- those obeying a religious mandate to discriminate racially, those religious schools discriminating for secular reasons, and those secular schools discriminating for secular reasons -- are equally subject to neutral application of Green's denial of Section 501(c)(3) status to all racially discriminatory private schools. Indeed, this is an even more compelling case than Heffron because the public purpose being vindicated is the product of the highest constitutional

mandate, rather than the exercise of the police power. Moreover, while in Heffron the Krishnas were barred (at least at a specified time and place) from fulfilling their religion's requirement of peripatetic solicitation, Bob Jones and Goldsboro merely suffer some financial detriment by being deprived of a governmental benefit available to all who meet neutral criteria.[23]

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23 The neutral criteria applied to petitioners threaten their actual religious belief and practice of non-miscegenation to a far lesser degree than present in Braunfeld v. Brown, 366 U.S. 599 (1961), where this Court upheld Sunday closing laws challenged by Orthodox Jewish merchants who were thereby deprived of a sixth working day. Even more so than in Braunfeld, the financial burden eventually traceable to the government's action is speculative and indirect depending as it does upon the decisions of independent contributors. Moreover,
(Footnote Continued)

The same result should obtain in this case as in Bob Jones University v. Johnson, supra. There, the court upheld termination of Bob Jones' status as an approved school for veterans' benefits under 38 U.S.C. § 1681 et seq. Such termination was held required under the Civil Rights Act of 1964 and the due process clause of the Fifth Amendment because of Bob Jones' racially discriminatory policies. 396 F. Supp. at 608. The court found no violation of the

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23 (Footnote Continued)

in Braunfeld nothing in the merchants' claim invoked government disapprobation to the degree here present; they merely sought a sixth day of work different from that sanctioned by the state, whereas here subsidization of conduct which is on a direct collision course with a quarter century of government anti-discrimination policies is involved.

freedom of association, free exercise or establishment clauses of the First Amendment in denying Bob Jones approved status, noting that:

> There is no judicial support for the proposition that unlawful discrimination accretes constitutionality by virtue of its duration, nor for the asserted principle that religiously based racism is immune from the prescriptions of constitutional law. Id. at 605 n.28.

The court emphasized further that free exercise claims have been regularly held not to require exemption from general law,[24] and that free exercise should be rejected as a defense to racial discrimination just as free association

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24 Id. at 607, citing Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878); Prince v. Massachusetts, 321 U.S. 158 (1954).

repeatedly has been.[25] Moreover, even assuming a sincere protected religious belief, "a refusal to fund a protected activity, without more, cannot be equated with the imposition of a penalty on that activity." Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

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25 Id. at 606. While the court did not cite any support for this latter proposition, the principle, as set forth in the following cases, is clear:

> We must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action. Gilmore v. City of Montgomery, supra, 417 U.S. at 575.

III. PETITIONERS ARE NOT ENTITLED TO SECTION 501(c)(3) STATUS AS "RELIGIOUS" INSTITUTIONS

In an attempted end run around the holding of Green that Section 501 (c)(3) status be denied racially discriminatory educational institutions, the district court labeled Bob Jones "primarily religious" and held it entitled to Section 501(c)(3) status with respect to all of its activities under the "religious" rather than "educational" branch of the statute. This, we submit, is improper as a matter of statutory and constitutional law.[26]

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26 The district court in Goldsboro Christian Schools, Inc. v. United States, supra, 436 F. Supp. at 1316, properly took notice of the fact that Goldsboro had undertaken to qualify under state secular education requirements, providing a religious setting within this secular framework.
(Footnote Continued)

Where educational and religious activities are combined in one entity, the burden is on the applicant for Section 501(c)(3) status to demonstrate that the

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26 (Footnote Continued)

In light of these facts, and the summary judgment posture of the case below, the court did not have to consider the actual sincerity of Goldsboro's asserted religious belief. However, record testimony from Goldsboro's principal concerning his application of a nonmiscegenation policy only to blacks casts a long shadow over any such assertion of sincerity:

> Where a climate exists whereby you have a certain race clamoring for certain things within the school's curriculum. Certain--making certain demands of society, every aspect of society, then I think you are on very thin grounds when you, particularly in a southern region where you open your doors to them in a Christian school situation. (No. 81-1, JA at 84)

educational activities independently qualify.[27] Rev. Proc. 75-50 and Rev. Rul. 75-231, discussed supra at 29-33. Under the guidelines, where a racially discriminatory school is incorporated separately from its sponsoring religious organization, the school can be denied Section 501(c)(3) benefits for this violation of public policy while the affiliated church's status is unaffected. However, where religious and educational

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27 The First Amendment does not create a per se entitlement to a tax exemption for organizations with a religious orientation, any more than creating an exception from the application of general law. Whether or not religious organizations are exempted from a particular tax is a matter within the discretion of the legislature enacting the taxing statute, Cf. Walz v. Tax Commission, supra, 397 U.S. 664, 677-679 and Gibbons v. District of Columbia, 116 U.S. 404 (1886).

functions are performed by the same legal entity, the entire organization's tax-exempt status is lost if the educational activities are racially discriminatory:

> A racially or ethnically discriminatory policy as to students is as contrary to Federal public policy under these circumstances as it is when the educational institution is separately incorporated. An analysis of the historical development of this fundamental expression of national policy reaffirms the conclusion that the form of the educational organization is not relevant for these purposes. See Norwood v. Harrison, 413 U.S. 455 (1973), in which the Supreme Court held that a state may not provide free textbooks to a private school if their availability would have a "significant tendency to facilitate, reinforce, and support private discrimination." In that case the Court made no exception for the schools that were not separate legal organizations but were directly operated by churches that were receiving free textbooks. It follows that the legal organization operating Y [the non-separately incorporated school] is frustrating Federal

> public policy by having a racially or ethnically discriminatory policy as to students. Under these circumstances, that organization is not operated exclusively for charitable purposes within the meaning of section 501(c)(3) of the Code and the regulations thereunder. Rev. Rul. 75-231, supra, at 159.

Requiring religious institutions to separate secular from religious functions as a condition for receipt of government aid is neither unreasonable nor unprecedented. Churches routinely account separately for their unrelated business income under Section 511 et seq. of the Internal Revenue Code of 1954. Parochial colleges seeking government grants to their secular activities separate expenditures for secular and religious purposes.[28]

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28 See, e.g., Roemer v. Maryland Public
(Footnote Continued)

The district court's finding of fact 8, Bob Jones University v. United States, 468 F. Supp. 890, 895 (D.S.C. 1978) which is the apparent basis for the legal conclusion that Bob Jones qualifies as a religious organization under Section 501(c)(3), does not justify the proposition asserted. Rather, this finding recognizes that Bob Jones "serves educational purposes." While the finding recites that Bob Jones "cannot be termed a sectarian school"

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28 (Footnote Continued)

Works Bd., 426 U.S. 736 (1976), upholding, against an Establishment Clause (entanglement) challenge, a Maryland statute authorizing subsidies to private institutions of higher learning (excluding seminarian or theological academic programs) with the proviso that the grants not be used for sectarian purposes and the requirement that the aided non-sectarian expenditures be reported and be subject to government verification.

and is "not an educational appendage," and that Bob Jones' "primary purpose is religious" and that it exists as a "religious organization," these labeling judgments are conclusions of law (or mixed questions of fact and law) appropriate for judicial review.[29] More to the point, and more genuinely fact findings, are findings

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29 "Whether particular beliefs constitute 'religion' is not simply a question of fact. The inquiry is a mixed question, a question of the application of law to facts." Brown v. Dade Christian Schools, supra, 556 F.2d at 316 (Goldberg, J., specially concurring). Similarly, this Court has reviewed the determination of the applicability of I.R.C. sections to specific facts as a legal conclusion or mixed question. Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491 (1936). See also, Hope School v. United States, 612 F.2d 298, 301 (7th Cir. 1980) (treating determination of the applicability of I.R.C. § 511 unrelated business income provisions to tax-exempt school as "matter of law").

of fact 1 and 3, which establish that Bob Jones' charter set up an "institution of learning," that it offers instruction in grades kindergarten through college and graduate schools, and that it offers fifty degrees.[30] As Bob Jones' president, Dr. Bob Jones III, stated in testimony in support of the school's alleged entitlement

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30 There are secular degrees in such subjects as French, Premed, Home Economics, Prelaw, Art, Broadcast Engineering, Health and Physical Education, and Accounting (No. 81-3, JA at A127-A128). Bob Jones also offers a nondegree program in its Institute of Christian Service which instills "knowledge of the Bible principles of the word of God and Christian character training" (id. at A75). That Bob Jones distinguishes between the religious program of its Institute and the University programs leading to secular degrees is clear. While Bob Jones could arguably separately incorporate and seek § 501 (c)(3) status for the Institute as a religious institution, it has not elected to do so despite Rev. Rul. 75-231 offering this alternative.

to veterans' benefit approved status: this is "not a glorified Sunday School" but a "valid, educational institution."[31]

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31 Bob Jones v. United States, supra, Brief for the Government Appellant in the Fourth Circuit, at 30.

IV. BOB JONES IS NOT DISTINGUISHABLE FROM GOLDSBORO: RACIAL DISCRIMINATION NEED NOT AMOUNT TO EXCLUSION

The point that racial discrimination not amounting to total exclusion is unconstitutional requires little discussion. The law is settled that treating racially mixed couples differently from those of the same race, Loving v. Virginia, 388 U.S. 1 (1967), and racially separating students in school facilities, McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950), are constitutionally impermissible. The Fourth Circuit's equation of Bob Jones and Goldsboro as "identical twins" was correct. No. 81-1, Petition for a Writ of Certiorari, at 2a.

To characterize the issue as a restriction on "dating," comparable to traditional parietals, is to trivialize it. As written and applied, Bob

Jones' interracial dating ban prohibits any social contact from kindergarten through post-graduate between black and white students of opposite sexes. Eating together in the school dining room or snack bar, walking across campus together, playing tennis or attending a sports event: all are proscribed racially mixed pairs although available to fellow students of the same race. Bob Jones v. United States, supra, Brief for the Government Appellant in the Fourth Circuit at 10.

Indeed, in addition to operating as a disincentive to black enrollment -- the record[32] below revealed a black enrollment of only five students out of a total of over 5,000 -- Bob Jones'

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32 No. 81-3, JA at A36, A73.

racial policies punish violators with expulsion from a secular degree program. While Bob Jones may constitutionally espouse its religious belief against racial intermarriage, and students may certainly choose their dating or marriage partners on whatever basis they like, government aid to an educational institution which expels students from secular degree programs for noncompliance with bans on interracial social contact violates constitutionally-based public policy.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX OF LETTERS
OF CONSENT TO FILING
AS AMICUS CURIAE

EMBLEM

U.S. Department of Justice
Office Of The Solicitor General

Washington, D.C. 20530
December 18, 1981

Leon Silverman, Esq.
Fried, Frank, Harris, Shriver
& Jacobson
One New York Plaza
New York, New York 10004

RE: Goldsboro Christian Schools, Inc. v. United States, No. 81-1; and Bob Jones University v. United States, No. 81-3

Dear Mr. Silverman:

As requested in your letter of December 14, 1981, I hereby consent to the filing of a brief amicus curiae on behalf of the NAACP Legal Defense & Educational Fund, Inc.

Sincerely,

/s/ Lawrence G. Wallace

Lawrence G. Wallace
Acting Solicitor General

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD
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December 21, 1981

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373-8850
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Mr. Leon Silverman, P.C.
Fried, Frank, Harris, Shriver
& Jacobson
One New York Plaza
New York, New York 10004

Re: Goldsboro Christian Schools, Inc. v. United States of America, No. 81-1

Dear Mr. Silverman:

Pursuant to Rule 26, petitioner Goldsboro Christian Schools, Inc. hereby gives its written consent to the NAACP Legal Defense and Educational Fund, Inc. filing an amicus curiae brief on the merits in the above referenced case.

Very truly yours,

/s/ William G. McNairy

Willliam G. McNairy
Counsel of Record for Goldsboro
Christian Schools, Inc.

LAW OFFICES
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Harrisburg, Pennsylvania 17108

Telephone
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December 22, 1981

Leon Silverman, Esq.
Fried, Frank, Harris, Shriver
& Jacobson
One New York Plaza
New York, New York 10004

Re: Bob Jones University v. United States of America, Supreme Court, No. 81-3

Dear Mr. Silverman:

On behalf of petitioner, Bob Jones University, we hereby consent to the filing of a brief amicus curiae by NAACP Defense & Educational Fund, Inc., in the above entitled case.

Very truly yours,

/s/ William B. Ball

William B. Ball

Motion

Office - Supreme Court, U.S.
FILED
JAN 15 1982
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1981

No. 81-1

Goldsboro Christian Schools, Inc.,
Petitioner,

v.

United States,
Respondent.

No. 81-3

Bob Jones University,
Petitioner,

v.

United States,
Respondent.

On Writs of Certiorari to the United States
Court of Appeals for the Fourth Circuit

MOTION TO INTERVENE AS RESPONDENTS, OR, IN THE ALTERNATIVE, TO PARTICIPATE AS AMICI CURIAE

The movants -- National Association for the Advancement of Colored People (hereinafter the "NAACP"); the Goldsboro Branch of the NAACP; Arthur W. Diggs, parent and next friend of Deloris L. Diggs; the Greenville Branch of the NAACP; and S.T. Peden, Jr., parent and next friend of Selden T. Peden -- hereby apply for leave to intervene as parties respondent in these cases and leave to file additional papers, pursuant to a schedule to be set by the Court, in support of affirmance of the judgments of the courts below. In the alternative, the movants apply, pursuant to

Rule 36 of this Court, for leave to file a brief as amici curiae in support of affirmance of those judgments, pursuant to a schedule to be set by the Court, and to participate in oral argument in support thereof.*

The NAACP is a New York corporation, organized in 1909 to combat racial discrimination in all facets of American life. It has more than 400,000 members, organized in 1600 Branches and 450 College and Youth Councils, located in all fifty states.**

The Goldsboro, N.C., Branch of the NAACP has been chartered by the National Board of Directors to carry out the policies and programs of the NAACP in, among other areas, education, housing, employment, public accommodations, and voting rights. The

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*In view of the Government's sudden and unexpected conduct in this litigation, the movants have had insufficient time to present a motion that fully complies with the formal specifications of the Rules of this Court. They request that conformity with these technical requirements be waived for the purposes of the present motion, and that the Court set a schedule for filing of additional papers by the movants, whether as parties respondent or as amici. The movants will expand upon any procedural or jurisdictional issues raised by this motion if requested by the Court.

Pursuant to the provisions of Rule 36, the Office of the Solicitor General on behalf of the respondent has assented orally to the movants' participation as amici curiae, and correspondence reflecting that assent will be filed promptly. Petitioner Bob Jones University through counsel initially assented to the movants' request, although without conceding timeliness, but that assent has subsequently been revoked and that petitioner does not currently assent. A similar request has been made to petitioner Goldsboro Christian Schools, Inc., and it is pending. Assent to the proposed intervention has not been sought or offered.

** Pursuant to Rule 28.1, the National Association for the Advancement of Colored People states that it is a nonprofit corporation, that it has a wholly owned subsidiary, Crisis Magazine, Inc., that the NAACP Special Contribution Fund and the NAACP National Housing Corp. are related corporations, and that it has no other parent corporations or subsidiaries.

Goldsboro Branch has members living in the city of Goldsboro, in which petitioner Goldsboro Christian Schools is also located.

Arthur W. Diggs is a member of the Executive Committee of the Goldsboro Branch and the Chairman of its Armed Services Committee. He is the father of Deloris L. Diggs, a twelve-year old black child now enrolled in the eighth grade of the Goldsboro public schools.

The Greenville, S.C., Branch of the NAACP has been chartered by the National Board of Directors to carry out the policies and programs of the NAACP in, amoung other areas, education, housing, employment, public accommodations, and voting rights. The Greenville Branch has members living in the city of Greenville, in which petitioner Bob Jones University is also located.

S.T. Peden, Jr., is President of the Greenville Branch and the father of Selden T. Peden, a ten-year old black child now enrolled in the fifth grade of the Greenville public schools.

The NAACP, which has appeared in this Court in countless cases involving racial justice, embodies the legal interests of hundreds of thousands of minority Americans, as well as non-minority Americans, with respect to those issues. See, e.g., NAACP v. Federal Power Comm'n, 425 U.S. 662 (1976); NAACP v. Button, 371 U.S. 415 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); NAACP v. Alabama, 357 U.S. 449 (1958). As residents of Greenville and Goldsboro, Arthur and Deloris Diggs and S.T. and Selden Peden and the other members of the branches have a vital interest in the subject matter of these cases.

The interest of the individual movants and of the NAACP and its Goldsboro and Greensville branches in these cases, for themselves and on behalf of their members, is direct, immediate and palpable. The rights of minority students, may of whom or whose parents are NAACP members, to a racially nondiscriminatory public education will be impaired by open government support of a segregated private alternative system, members will be forced to subsidize through their tax dollars illegal racial discrimination in their own communities, and members in contact or proximity with petitioners and similar institutions will be confronted in their daily lives with this tax-supported racial insult and badge of slavery. Furthermore, membership in the NAACP and its branches is directly impeded by the rules of Bob Jones University requiring expulsion of students affiliated with any organization that advocates interracial marriage.

Although the present parties in these cases may no longer be adversaries, the question whether the petitioners and other racially discriminatory schools may qualify as charitable institutions within the meaning of section 501(c)(3) of the Internal Revenue Code is a controverted one of profound national importance.* Now that, for the first time in modern history, the United States Government has explicitly condoned avowed racial discrimination, only the injured individuals and associations

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* To illustrate the breadth of this problem, the IRS has identified 111 private schools whose status was affected; the NAACP has branches in the communities where 108 of these schools are located. See N.Y. Times, Jan. 13, 1982, at A-11 (city ed.)

that represent them can truly and adequately represent the interests in issue and at jeopardy.

The movants seek to intervene in this Court in support of the judgment below. The purported change in policy by the Executive Branch, withdrawing its prior rulings and approving tax exemptions for racially discriminatory schools, would not render the present cases moot. The Government's action would also be in violation of the United States Constitution, federal statutory law, and this Court's unanimous decision in Coit v. Green, 404 U.S. 997 (1971).* If this Court chooses to remand the present cases for further proceedings in the lower federal courts, the movants will seek to protect their interests and the interests of their members by participating in those proceedings.

This Court has granted motions to intervene where necessary to protect the rights of nonparties. See, e.g., Dames & Moore v. Regan, 49 U.S.L.W. 3928 (1981); NLRB v. Baptist Hospital, Inc., 440 U.S. 943 (1979); Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944) (permitting intervention by person not notified of lower court proceedings); United States v. Terminal R.R. Ass'n, 236 U.S. 194 (1915) (permitting intervention to protect nonparties' interests in modification of decree). This Court has also permitted intervention in proceedings before it to guarantee the continuation of an adversarial controversy

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* Indeed, the plaintiffs in Green v. Regan, Civ. No. 1355-69 (D.D.C.) (on remand from this Court's decision in Coit v. Green), have moved for an injunction against the Government's proposed action.

susceptible of adjudication. Rogers v. Paul, 382 U.S. 198 (1965) (intervention of class members as parties plaintiff); Mullaney v. Anderson, 342 U.S. 415 (1952) (intervention of union members as parties plaintiff). Finally, this Court has upheld the right of intervention in lower courts for the purposes of appeal where nonparties had relied on the Government to protect their interests in earlier proceedings. See, e.g., Bryant v. Yellen, 447 U.S. 352 (1980) (private landowners may intervene in district court to appeal when United States fails to do so); United Automobile Workers v. Scofield, 382 U.S. 205 (1965) (charging party has right to intervene in court of appeals review of NLRB decision).

The present motion to intervene could not be more timely. Intervention is necessitated by the sudden and shocking reversal of the Government's position in this litigation. The determinative factor in measuring the timeliness of a motion to intervene is when the nonparties became aware that their interests would no longer be protected adequately by the parties before the court. United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977); Legal Aid Society v. Dunlop, 618 F.2d 48 (9th Cir. 1980). That happened less than a week ago. Nor is this motion premature. Intervention at this time is essential if the movants are to protect their rights. This Court has warned that, to preserve its right of intervention, the NAACP should intervene at the first objective indication that the Justice Department is sacrificing the rights of NAACP members. NAACP v. New York, 413 U.S. 345 (1973).

Although the movants believe that intervention as parties is necessary to protect their rights in these cases, if this Court is unwilling to permit movants to intervene, movants seek in the alternative an opportunity to express their views as amici curiae. Accordingly, they respectfully move in the alternative for permission to participate as amici curiae if their motion to intervene is denied.

CONCLUSION

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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Dated: January 15, 1982

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 1982, copies of this motion were mailed, postage prepaid, to William G. McNairy, Brooks, Pierce, McLendon, Humphrey & Leonard, Post Office Drawer U, Greensboro, N.C., 27402, Counsel for Petitioner Goldsboro Christian Schools, and to William Bentley Ball, Ball & Skelly, 511 North Second Street, P.O. Box 1108, Harrisburg, Pa., 17108, Counsel for Petitioner Bob Jones University, and that copies of this motion were delivered by hand to the Office of the Solicitor General, United States Department of Justice, Washington, D.C., 20530.

Robert D. Goldstein
Counsel for Movants

Amicus Brief

9

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS, CLERK

Nos. 81-1 and 81-3.

In the Supreme Court of the United States

OCTOBER TERM, 1982

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

BOB JONES UNIVERSITY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief of the National Association for the Advancement of Colored People, et al., *Amici Curiae* In Support of Affirmance

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INTEREST OF AMICI

The interest of the Amici is more fully set out in their Motion to Intervene as Respondents, Or, In the Alternative, To Participate As Amici Curiae. This Court granted permission to file a brief as amicus curiae on April 19, 1982. The individual Amici, like other members of the Greenville and Goldsboro branches, live directly within the shadow of Petitioners' institutions. They are the targets of Petitioners' exclusionary policies, both because they are black, and (in the case of Bob Jones University) by the mere fact of their membership in the NAACP, an organization supporting the right to racial intermarriage.

SUMMARY OF ARGUMENT

Amici support affirmance of the judgments below. Congress has offered

tax-exempt status under I.R.C. § 501(c)(3) in order to encourage selected categories of organizations that promote the general welfare. Continuing expressions of legislative intent and governing rules of tax law demonstrate the correctness of this Court's prior holding that private schools engaging in deliberate racial discrimination are not exempt under Section 501(c)(3). Furthermore, this interpretation of the statute is compelled by the constitutional ban on significant government aid to private racial discrimination in education.

Petitioners' religious beliefs do not entitle them to more favorable tax treatment than other discriminatory schools receive. Petitioners assert a purported First Amendment right to tax benefits for their practice of racial discrimination in enterprises they have established to offer secular educational

services as an alternative to the more worldly (and integrated) public schools. Their claim is easily outweighed by the government's interests in avoiding the harms their conduct inflicts, and in withholding assistance from private invidious discrimination. Nor do Petitioners' claims justify application of an extraordinary rule of statutory construction to avoid deciding the insubstantial questions they raise.

ARGUMENT

I. BOTH THE INTERNAL REVENUE CODE AND THE CONSTITUTION PROHIBIT TAX-EXEMPT STATUS FOR RACIALLY DISCRIMINATORY SCHOOLS.

A. The Internal Revenue Code Denies Tax-Exempt Status To Racially Discriminatory Private Schools.

Congress has not authorized tax exemptions for "educational" institutions that discriminate on the basis of race. This Court decided that issue in Coit v.

Green,[1] and decided it correctly. This Court should reaffirm that holding in the present case.[2]

1/ 404 U.S. 997 (1971). Subsequently, in a passing remark, this Court questioned the precedential effect of Green, suggesting that no adversarial dispute had persisted, see Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974). Amici agree with the analysis in Wright v. Regan, 656 F.2d 820, 832 & n.29 (D.C. Cir. 1981), that Green is entitled to the same precedential weight this Court normally accords summary affirmances, and that the courts below were bound by this Court's holding, as well as by Judge Leventhal's reasoning. Contrary to the Respondent's suggestion, Brief for the United States at 38 n.35, principles of stare decisis are applicable here. See Tully v. Griffin, Inc., 429 U.S. 68, 74 (1976), particularly on statutory issues, compare Edelman v. Jordan, 415 U.S. 671 (1974); Patsy v. Board of Regents, 102 S.Ct. 2557, 2569 (1982) (White, J., concurring).

2/ Because of Respondent's startling change of position Amici will begin by examining the broad issue decided in Green, whether Section 501(c)(3) of the Internal Revenue Code permits tax exemptions for private schools that deliberately and systematically discriminate against black children in admissions or other activities. Amici will later demonstrate that the assertedly religious basis of Petitioners' invidious policies provides no basis for distinction from the holding in Green.

Petitioners in this case seek refunds of token employment tax payments as a vehicle for obtaining all the benefits of tax-exempt status as religious and educational organizations under I.R.C. § 501(c)(3). The most valuable advantage of exempt status would be the availability to Petitioners' donors of charitable contribution deductions from their own net income.[3/] These deductions have the same economic effect as a matching grant from the Treasury, and are designed to encourage private donations to a select group of organizations favored over other tax-exempt entities. Compare I.R.C. § 170(c) with I.R.C. § 501(c).

Section 501(c)(3) exempts, inter

3/ See e.g., Green v. Kennedy, 309 F.Supp. 1127, 1134-35 (D.D.C. 1970); Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of The House Comm. on Ways and Means, 96th Cong., 1st Sess. 288, 302 (testimony of William Bentley Ball); id. at 400 (testimony of John Esty).

alia, corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." As this Court noted long ago, "the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 581 (1924). In reenacting the exemption Congress has stated the same rationale:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1939).

No exemption is available for organizations that confer no public benefit.[4/] Therefore, not every activity that is literally "educational" in the dictionary sense of conveying information or providing instruction qualifies as an exempt educational purpose under Section 501(c)(3).[5/]

A fortiori, organizations whose activities include deliberate subversion of the public interest are not eligible for the benefits that Section 501(c)(3)

4/ See, e.g., Randall Foundation v. Riddell, 244 F.2d 803 (9th Cir. 1957); Callaway Family Ass'n v. Commissioner, 71 T.C. 340 (1978) (nonexempt family genealogical study); Rev. Rul. 80-301, 1980-2 C.B. 180 (exempt public genealogical society).

5/ For example, an organization of computer owners that instructs its membership in use of a specific type of computer through seminars, newsletters, and meetings, does not serve a public interest, and is not "educational" within the meaning of the Code. Rev. Rul. 74-116, 1974-1 C.B. 127. See also Rev. Rul. 71-421, 1971-2 C.B. 229 (obedience school for dogs not "educational").

status entails. Otherwise, as the late Judge Leventhal observed, Fagin's school for pickpockets would be an exempt educational endeavor.[6/] The statute cannot bear so absurdly literal a reading as Petitioners and Respondent suggest. First, the expressed congressional intent behind the statutory exemption was to reward organizations for enhancing the general welfare. Congress never intended to subsidize activities inimical to the public interest.[7/] Second, exempt status

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6/ Green v. Connolly, 330 F. Supp. 1150, 1160 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971). Similarly, if every religious organization were eligible for a tax exemption, the Assassins of Alamut and their modern equivalents would be included. These cases do not require the Court to determine the limits on exempt status for corporations organized and operated exclusively for religious purposes, however, since Petitioners are not such corporations. See Part II(A) infra.

7/ This controlling legislative intent has long been expressed by the statement that all 501(c)(3) organizations must

(footnote continued)

is offered only to entities organized and operated exclusively for the enumerated purposes.[8/] Deliberately undermining the public interest is itself a substantial nonexempt purpose precluding eligibility.

This obvious limitation on the grant of exempt status is reinforced by the public policy doctrine which informs interpretation of the Internal Revenue Code generally. This Court has modified even the rules for computing net income

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(footnote continued)

be "charitable" in the broad common law sense. See Bob Jones University v. United States, 639 F.2d 147, 151 (4th Cir. 1980); Rev. Rul. 71-447, 1971-2 C.B. 230. Amici will not attempt yet another review of the legislative history supporting this statement, since other briefs have exhaustively explored the topic.

8/ "[T]he presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes." Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945).

where allowing deductions would "'frustrate sharply defined national or state policies proscribing particular types of conduct . . . evidenced by some governmental declaration,'" Commissioner v. Tellier, 383 U.S. 687, 694 (1966) (emphasis deleted); Cammarano v. United States, 358 U.S. 498 (1959); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958). Congress adopted and codified this rule for business expense deductions in I.R.C. § 162. The public policy doctrine is particularly applicable where taxpayers claim preferential tax treatment for transactions that the government seeks to discourage.[9/]

9/ See, e.g., Commissioner v. Estate of Donnell, 417 F.2d 106, 112 (5th Cir. 1969) (special privilege deduction under I.R.C. § 263); Mazzei v. Commissioner, 61 T.C. 497 (1974) (theft loss deduction under I.R.C. § 165); Rev. Rul. 75-384, 1975-2 C.B. 204 (§ 501(c)(3) exemptions denied to activist organization encouraging violations of law).

Thus, the public policy doctrine also requires denial of tax exempt status under Section 501(c)(3) to organizations deliberately violating sharply defined federal policy, even if they may literally be described as "educational." Congress never intended to authorize tax subsidies to support activities it has vigorously discouraged.10/

Few federal policies are more sharply defined than the condemnation of deliberate racial discrimination in education. This Court has struggled for decades to eradicate state involvement in racial discrimination, and has repeatedly emphasized the pervasive destructive-

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10/ Of course, an organization need not be a criminal enterprise to forfeit its exemption; this Court has applied the public policy doctrine to traffic fines and to perfectly lawful expenditures made nondeductible only by Treasury regulations. Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958); Cammarano v. United States, 358 U.S. 498 (1959).

ness of segregated schooling. Federal law forbids private schools as well to discriminate against black children.[11] The urgency of the federal interest in banning private discrimination in education, for the protection of black children and the establishment of civil equality, is magnified by the role segregation academies have played in circumventing public school desegregation and the complicity of the states in fostering resort to the private schools through programs of financial support that lasted well into the Seventies.[12] There could be

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11/ Runyon v. McCrary, 427 U.S. 160 (1976). This Court reserved the question whether a different interpretation of the 1866 Civil Rights Act was required where religious schools were involved. Id. at 167. That issue is addressed in Part II of this brief.

12/ This Court has been forced to exercise continual vigilance by efforts to perpetuate school segregation in the guise of aid to private schools. See, e.g.,

(footnote continued)

little surprise therefore, when the Internal Revenue Service announced that segregated private schools would lose their federal tax exemptions if their involvement with the state amounted to state action.[13/]

Federal policy prohibits tax exemp-

(footnote continued)

Gilmore v. City of Montgomery, 417 U.S. 556 (1974); South Carolina State Bd. of Educ. v. Brown, 393 U.S. 222 (1968), aff'g mem. 296 F. Supp. 199 (D.S.C.); Wallace v. United States, 389 U.S. 215 (1967), aff'g mem. 267 F. Supp. 458 (M.D. Ala. 1967); Griffin v. County School Bd., 377 U.S. 218 (1964); St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962), aff'g mem. 197 F. Supp. 649 (E.D. La. 1961). See generally Note, Segregation Academies and State Action, 82 Yale L.J. 1436, 1436-53 (1973). This state-fostered psychology of reliance on private schools persists today even where the state's action has ceased.

13/ IRS News Release, August 2, 1967, [1967] CCH Standard Fed. Tax Rep. ¶ 6734. Certainly federal policy forbids tax subsidies to an organization whose deliberate practice of racial discrimination violates the Fourteenth Amendment. Compare Hills v. Gautreaux, 425 U.S. 284 (1976) (Constitution forbids federal assistance to discriminatory state agency).

tions for all segregated private schools, regardless of whether they receive state aid. This prohibition rests on two distinct pillars of federal law. One, rooted in the Fifth Amendment and Section One of the Fourteenth Amendment, forbids government support or subsidization of segregated education.[14/] The second source, based ultimately on the Thirteenth Amendment and Section Five of the Fourteenth Amendment, condemns racial discrimination in private business

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14/ See Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954); Norwood v. Harrison, 413 U.S. 455 (1973). Congress has voiced a parallel statutory policy in Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c to 2000c-9, 2000d to 2000d-6, which has been implemented by numerous regulations. See, e.g., 34 C.F.R. part 100 (Department of Education programs); 38 C.F.R. part 18 (Veterans' benefits programs); 45 C.F.R. part 611 (National Science Foundation programs); 7 C.F.R. § 15.3(d)(4) (school lunch program).

transactions.[15/] Since segregated schools, public or private, are in fact unlawful, Congress could not have intended to subsidize them.

Accordingly, in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971), a three-judge district court concluded that the federal policy against government support for racial segregation in schools would be severely frustrated by the availability of tax exemptions and charitable deductions to support those schools. Therefore, it held, Section 501(c)(3) must be read to deny exempt status to private schools that engage in racial discrimination. An intervening

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15/ Congress has articulated these policies in, e.g., the 1866 Civil Rights Act, 42 U.S.C. §§ 1981, 1982, and titles II and VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a to 2000a-6, 2000e to 2000e-17.

group of white parents appealed to this Court, and this Court affirmed summarily.

The reasoning of Green was followed by another three-judge court, which construed I.R.C. § 501(c)(8) as denying exempt status to racially discriminatory fraternal benefit orders. McGlotten v. Connally, 338 F. Supp. 448, 460 (D.D.C. 1972). That court also held, however, that I.R.C. § 501(c)(7) did permit tax exemption for discriminatory social clubs, reasoning that the conceptually different nature of club income and taxation precluded any actual economic benefit to the clubs from the exemption. Id. at 458.

Congress responded to the Green and McGlotten cases by making a single amendment to the Code. Citing this Court's decision in Green as operative law, Congress acted to overturn the only holding that permitted exemptions for a

discriminatory organization.[16/] In enacting I.R.C. § 501(i), Congress rejected the distinction between social clubs and

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16/ Petitioner Bob Jones University suggests that Congress must have rejected the Green holding because Section 501(i) is the only subsection that explicitly mentions race. This argument is senseless, given the legislative history and the prior state of the law. The committee reports expressly set out as "Present law" this Court's affirmance of Green v. Connally, and the McGlotten holding concerning fraternal benefit societies. S. Rep. No. 1318, 94th Cong., 2d Sess. 7-8 & n. 5 (1976); H.R. Rep. No. 1353, 94th Cong., 2d Sess. 8 & n.5 (1976). The obvious purpose was to bring the treatment of social clubs into conformity with the treatment of other organizations, only amending the Code to the extent necessary to correct the deviation from a consistently recognized policy.

Congress has subsequently reaffirmed the policy against subsidizing racially discriminatory private clubs, in amending Section 501(i). The new version permits discrimination on the basis of religion by certain religiously affiliated clubs and fraternal benefit societies (e.g., the Knights of Columbus and the Catholic Alumni Clubs; see S. Rep. No. 1033, 96th Cong., 2d Sess. 9-10 (1980)), but carefully reiterates that the religious discrimination must be in good faith, and not intended "to exclude individuals of a particular race or color."

other nonprofit organizations, insisting that tax exemptions for racially discriminatory clubs were inappropriate "[i]n view of national policy." S. Rep. No. 1318, 94th Cong., 2d Sess. 8 (1976). The legislative withdrawal of tax exemptions from racially discriminatory private clubs is particularly eloquent testimony to the strength of the federal policy against subsidizing private discrimination even when it is otherwise tolerated: Congress had carefully exempted private membership clubs from the substantive prohibitions of Title II and Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000a(e), 2000e(b). Private schools, of course, enjoy no such privilege.

Even the recent Ashbrook and Dornan Amendments[17/] demonstrate Congress'

17/ Pub. L. No. 96-74, §§ 103, 615, 93 Stat. 559, 562, 577. These were appropri-

(footnote continued)

approval of the Green holding that intentional discrimination deprives a private school of its exempt status. As Representative Ashbrook explained, his target was a new proposed revenue procedure[18/] that might "create a quota or minority affirmative action system for the Nation's private education." 125 Cong. Rec. H5879 (daily ed. July 13, 1979). Representative Ashbrook repeatedly stressed

> that my amendment would not in any way interrupt [the IRS's] continued case-by-case process which they were using up until

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(footnote continued)

ations riders denying the Internal Revenue Service the use of funds to formulate or carry out any new procedures for withdrawing 501(c)(3) status from previously exempted schools, and limiting the Service to those procedures in effect as of August 22, 1978.

18/ Proposed Rev. Proc. 4830-01, 43 Fed. Reg. 37,296 (Aug. 22, 1978); Proposed Rev. Proc. 4830-01-M, 44 Fed. Reg. 9451 (Feb. 13, 1979).

> August 22 and from which point they are going to change.
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> ...
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> As I pointed out, under their current regulation [Rev. Proc. 75-50] they can review schools. . . . I am not trying to take that away.

Id. at H5882; see id. at H5884.[19/] Other supporters of these amendments expressed similar approval of existing procedures,[20/] and even those who questioned the IRS's authority agreed that denial of exempt status was the correct policy.[21/]

19/ The same points were emphasized by Representative Dornan in support of his equivalent amendment. 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (colloquy between Reps. Dornan and Mitchell); id. at H5982 (remarks of Rep. Dornan).

20/ See, e.g., 125 Cong. Rec. at H5883 (remarks of Rep. Sensenbrenner); id. at H5884 (remarks of Rep. Hammerschmidt); id. at H5885 (remarks of Rep. Dickinson); id. at H5982 (remarks of Rep. Miller).

21/ See id. at H5881 (remarks of Rep. Campbell); id. at H5884 (remarks of Rep. Grassley); id. at H5982 (remarks of Rep. Goldwater).

These ongoing expressions of Congressional civil rights policy have great significance for the proper construction of the Code, due to the public interest basis of the exemption at issue and to the very nature of the public policy doctrine. The proper interpretation of Section 501(c)(3) today does not depend on federal civil rights policy in 1913 or 1921 or 1939 any more than this Court's decision in Tank Truck Rentals depended on highway trucking policy in 1913, when the deduction for "necessary" business expenses first appeared in the income tax laws.[22/] Congress is not obliged to amend myriad provisions of the tax laws every time a major federal policy is implemented, at the risk of having authorized federal subsidy of unlawful or antisocial behavior. For

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22/ Tariff Act of 1913, ch. 16, § II(B), 38 Stat. 114, 167.

example, whatever doubt may have existed in the past, organizations created to "educate" the public concerning the on-going operations of the Central Intelligence Agency by disclosing the identities of its agents would surely be denied a Section 501(c)(3) exemption after the passage of the Intelligence Identities Protection Act of 1982.[23/] A fortiori, the Thirteenth and Fourteenth Amendments and the Civil Rights Acts of 1866 and 1964 suffice to articulate a "sharply defined national policy" precluding tax subsidies for racial discrimination in education.

Petitioners' separation-of-powers objections to these well-established principles are frivolous. The Internal Revenue Service has not imposed substantive legislation banning racial discri-

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23/ Pub. L. No. 97-200, 96 Stat. 122.

mination in education and federal assistance to segregated schools -- Congress has done that.[24] Under the circumstances, congressional intent and this Court's decisions leave the Internal Revenue Service no choice but to conform its Section 501(c)(3) exemption rulings to those legislative policies.[25] Congress has delegated to the Executive Branch ample authority to implement the

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24/ In fact, though Congress has enacted statutory prohibitions, the denial of federal tax subsidies to segregated schools is constitutionally compelled. See Part I(B) infra.

25/ Petitioners' suggestions that the Internal Revenue Service exercises capricious value judgments in selecting the policies it enforces are utterly fantastic: the record is only too clear that the Service has acted under the prod of judicial scrutiny, based on constitutional and statutory mandates, in its treatment of segregated private schools. See, e.g., Tax-Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. 2 (1979) (remarks of Rep. Gibbons); id. at 5, 859 (testimony of Jerome Kurtz).

procedures necessary to carry out this directive.

B. The Fifth Amendment Forbids Federal Tax Benefits For Racially Discriminatory Schools.

Settled principles of constitutional law demonstrate that Congress could not extend the special tax privileges the Internal Revenue Code affords educational corporations to schools that discriminate on the basis of race. Since others have briefed this issue in detail,[26/] Amici wish only to emphasize a few points here.

This Court's decision in Norwood v. Harrison, 413 U.S. 455 (1973), which controls the present cases, was the culmination of a series of holdings condemning tangible government aid to the all-white private schools whose

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26/ See especially Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 5-18.

enrollments swelled at the expense of the public schools wherever desegregation occurred.[27/] The first decisions involved deliberate dismantling of public school systems and massive state support through direct grants and tax credits for nominally private schools. By the time of Norwood, however, the Court recognized an affirmative constitutional duty to steer clear of giving any significant aid to schools that practice racial discrimination. 413 U.S. at 467.

Several of the Court's subsidiary holdings in Norwood have particular significance for the present litigation:

> --The private schools need not pose a demonstrable threat to public school desegregation for state aid to be unlawful.

27/ See, e.g., cases cited in note 12 supra.

Id. at 467-68. 28/

--The state's benign motives and the neutrality of the school aid program do not excuse its inclusion of segregated private schools as beneficiaries. Id. at 466.

--Although the state need not cut the schools off from generalized public services provided to the entire community, such as electricity, water, and police and fire protection, it cannot offer tuition grants or educational tools that are supplied to them because they are schools. Id. at 465.

--The leeway for state aid to sectarian schools, created by the tension between Free Exercise and Establishment Clause

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28/ Lest it be assumed, however, that the ban on state aid required by Norwood has eliminated the threat segregation academies pose to unitary public school systems, Amici observe that the Prince Edward Academy, an example familiar to this Court from, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964), still educates nearly two-thirds of the white school children in Prince Edward County, Virginia. See Washington Post, Jan. 25, 1982 at A1.

> values, "has no place in defining the permissible scope of state aid to private racially discriminatory schools." Id. at 464 n.7. 29/

The essential teaching of Norwood was summed up in Gilmore v. City of Montgomery, 417 U.S. 556, 568-69 (1974):

> any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is

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29/ Needless to say, the Court's rejection of a government stance of benevolent neutrality toward segregation in private schools, and the contrast between the holdings of Norwood and Board of Education v. Allen, 392 U.S. 236 (1968), are fatal to the reliance of Petitioners and Respondent on Walz v. Tax Commission, 397 U.S. 664 (1970), for the formalistic proposition that tax exemptions are not to be considered state aid. Furthermore, Petitioners' naive distinction between "passive" refraining from taxation and "active" state aid is not even valid in the Establishment Clause context. See Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 791-94 (1973).

> constitutionally prohibited if it has a 'significant tendency to facilitate, reinforce, and support private discrimination.'

The tax exemptions demanded by Petitioners in these cases would constitute massive government subsidies to segregated education, dwarfing the textbook loan program condemned in Norwood. Petitioners would be free of hundreds of thousands of dollars in unemployment and social security taxes, as well as excise taxes on fuels and telephone service,[30/] and they would be eligible for preferred mailing rates.[31/] The availability of "charitable" contri-

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30/ See I.R.C. §§ 4041(g), 4253(j).

31/ See 39 C.F.R. Parts 132, 134. Price discrimination in mailing rates, like the lower rate of unemployment taxation authorized by I.R.C. § 3309(a)(2), constitutes an actual government subsidy of a specific service, and is not a mere "refraining from taxation" even on Petitioners' own theory.

bution deductions would create powerful incentives for donors to contribute to Petitioners, affording matching grants from the Treasury while reducing the donors' income, estate and gift tax liability.[32] All of these would be special favors granted by Congress as a reward to Petitioners for providing educational services in competition with the public schools.[33]

32/ See, e.g., I.R.C. §§ 170(c)(2)(B), 642(c)(2), 2055(a), 2522(a).

33/ Respondent demonstrates its incomprehension of Norwood and Gilmore when it suggests that interest deductions and medical expense deductions might subject individuals to constitutional obligations. Brief for the United States at 39 n.37. These deductions are general benefits made available to every citizen, not special privileges created to reward and encourage educational organizations. The commentators Respondent cites were writing without the guidance of this Court's opinions in Norwood and Gilmore.

Respondent's ultimate effort to avoid the force of Norwood and Gilmore is the

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Thus, for the reasons clearly stated by this Court in Norwood, and more fully expounded by other amici, the inclusion of racially discriminatory private schools within the exemption granted by Section 501(c)(3) would constitute a denial of equal protection in violation of the due process clause of the Fifth Amendment.

(footnote continued)

invitation to the Court to overrule those cases, see id. at 39 n.36, an action that would prompt the resurrection of state aid schemes that the Court has struggled for years to discourage. Respondent's only basis for this suggestion is a purported inconsistency with Washington v. Davis, 426 U.S. 229 (1976), which held that government employment practices cannot be shown to violate equal protection merely by demonstrating discriminatory impact. That holding has no relevance to the permissible scope of knowing government aid to private schools that concededly engage in deliberate and systematic invidious discrimination. Cf. Hills v. Gautreaux, 425 U.S. 284 (1976). Nor could Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), impair the authority of Norwood, since Norwood was decided after Moose Lodge, and the Chief Justice expressly distinguished that precedent in Norwood. See 413 U.S. at 465.

II. PETITIONERS' RELIGIOUS BELIEFS DO NOT ENTITLE THEM TO PREFERENTIAL TAX TREATMENT UNAVAILABLE TO OTHER RACIALLY DISCRIMINATORY SCHOOLS.

As the foregoing has demonstrated, Section 501(c)(3) must be interpreted to deny tax exempt status to nonsectarian schools that practice racial discrimination, both as a matter of correct statutory construction and as a matter of constitutional law. Petitioners are not entitled to different treatment merely because their religious beliefs are said to require racial discrimination.[34/]

34/ Petitioner Bob Jones University's policies, which deny admission to blacks who have white spouses and which require expulsion of students who engage in interracial dating, are legally indistinguishable from the total exclusion policy of Petitioner Goldsboro Christian Schools. The 1866 Civil Rights Act, like the Constitution itself, forbids discrimination on the basis of interracial marriage or association. See, e.g., Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Bills v. Hodges, 628 F.2d 844 (4th Cir. 1980); De Matteis v. Eastman

(footnote continued)

The language of Section 501(c)(3) precludes different treatment for sectarian private schools, and Petitioners' insubstantial Free Exercise arguments do not justify a misreading of the statute in their favor.

A. Petitioners Are Not Organized And Operated Exclusively For Religious Purposes, And Therefore Must Satisfy The Same Requirements As Other Schools Under Section 501(c)(3).

Although Petitioners lay great stress on the fact that they are religious organizations as well as educational organizations, their exemption status must stand or fall with the status of nonreligious segregated schools. Petitioners' argument has overlooked a crucial element of Section 501(c)(3) law -- the qualifi-

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Kodak Co., 511 F.2d 306 (2d Cir.), modified on other grounds, 520 F.2d 409 (2d Cir. 1975); Faraca v. Clements, 506 F.2d 956 (5th Cir.), cert. denied, 422 U.S. 1006 (1975); Holiday v. Belle's Restaurant, 409 F. Supp. 904 (W.D. Pa. 1976).

cation that an entity must be organized and operated exclusively for one or more of the specified exempt purposes.[35/]

The status of entities organized and operated exclusively for religious purposes, like Sunday schools, churches and monasteries, is not at issue in this litigation. As the findings of the courts below and the records supporting those findings indicate, Petitioners are organized and operated both for religious purposes and for nonreligious "educational"

35/ The dissenting judge of the Fourth Circuit committed the same fallacy:

> I would construe § 501(c)(3) to grant Bob Jones University its exemption for "religious" purposes. That being true, there is no reason to test the grant of an exemption for educational purposes...

Bob Jones University v. United States, 639 F.2d 147, 156 (4th Cir. 1980) (Widener, J., dissenting).

purposes.[36] Petitioner Bob Jones University has continually stressed the academic quality of its secular instructional programs, including the training of qualified teachers and accountants who can meet nationwide standards of professional competence.[37] Petitioner

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36/ See Bob Jones University v. United States, 639 F.2d 147, 150 (4th Cir. 1980) ("The University is an educational institution as well as a religious one."); Bob Jones University v. United States, 468 F. Supp. 890, 895 (D.S.C. 1978) (District Court's findings of fact). It is rarely necessary to distinguish between religious and educational activities for purposes of Section 501(c)(3), since the exemption normally does not turn on which of the enumerated purposes is present. The notion of "exclusively religious" activities is relevant, however, in Section 6033(a)(2)(A) of the Code; regulations and legislative history under that provision make clear that an educational activity within the meaning of Section 501(c)(3) is not considered an "exclusively religious" activity. See 26 C.F.R. § 1.6033-2(g)(5)(ii); H.R. Rep. No. 782, 91st Cong., 1st Sess. 286 (1969) (Conference Report).

37/ See, e.g., Joint Appendix in No. 81-3 at A61-A68 (testimony of

(footnote continued)

Goldsboro Christian Schools emphasizes in its Complaint its record of compliance with North Carolina minimum standards for schools satisfying the compulsory attendance laws.[38/] This Court has long

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President Bob Jones III), id. at A88-A89 (testimony of Director of Admissions David Christ); id. at A260 (Defendant's Exhibit No. 11, "WHY Bob Jones University Was Founded") ("The University is no more a preachers' school or missionaries' school than it is a teachers' school, a business school..."), A263-A264, A267-A268 (training of teachers and CPA's). The Certificate of Incorporation of Bob Jones University states as the corporate object "the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to [certain enumerated religious doctrines]." Bob Jones University v. United States, 468 F. Supp. 890, 893 (D.S.C. 1978). Such a document is determinative under IRS regulations in ascertaining the "purposes" for which a corporation is "organized," see 26 C.F.R. §1.501(c)(3)-1(b).

38/ See Complaint, Joint Appendix in No. 81-1 at 6-7; N.C. Gen. Stat. § 114-255 (1978) (superseded 1979 by id. §§ 115C-547 et seq. (Cum. Supp. 1981))(minimum standards laws); id. § 115-166 (1978) (amended and recodified at id. § 115C-378 (Cum. Supp. 1981)) (compulsory attendance laws). The

(footnote continued)

recognized the secular and public purposes that compulsory attendance laws serve, even when private sectarian schools provide the education.[39/]

The very substantial secular instructional purposes that animate Petitioners' activities must independently satisfy the exemption test of Section 501(c)(3) if Petitioners are to claim its benefits. Subjective religious

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(footnote continued)

Articles of Incorporation of Goldsboro Christian Schools, Inc. state the corporate object in words virtually identical to those used by Bob Jones University. See Goldsboro Christian Schools, Inc. v. United States, 436 F.Supp. 1314, 1316 (E.D.N.C. 1977); note 37 supra.

39/ See Board of Education v. Allen, 392 U.S. 236, 245-47 (1968); Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930). Indeed, if sectarian schools served no substantial nonreligious purposes, even the provision of textbooks to their students would be impermissible state aid under the "secular purpose" and "primary effect" tests of the Establishment Clause. See, e.g., Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 774-76 (1973).

motivation does not render activities "exclusively religious" in purpose within the meaning of the Code if, when viewed objectively, the activities are non-exempt.[40/] For religious organizations as for other organizations, "the presence of a single [nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes." Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945).

As this brief has already demonstrated, however, Petitioners' secular

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40/ See, e.g., Scripture Press Foundation v. United States, 285 F.2d 800 (Ct. Cl. 1961), cert. denied, 368 U.S. 985 (1962) (religious publishing house); Fides Publishers Association v. United States, 263 F. Supp. 924 (N.D. Ind. 1967) (religious publishing house); Schoger Foundation v. Commissioner, 76 T.C. 380 (1981) (religious resort); Church in Boston v. Commissioner, 71 T.C. 102 (1978) (religious organization making arbitrary "charitable" grants to individuals).

"educational" purposes are not exempt educational purposes within the meaning of the Code. Segregated schooling is simply not an exempt educational activity. The fact that Petitioners are also organized and operated in part for religious purposes is not enough to make their activities exclusively exempt ones, and therefore does not qualify them for exemption under Section 501(c)(3).

B. Petitioners' First Amendment Claims Are Insubstantial, And This Court Should Not Strain To Avoid Deciding Them.

Even assuming that Petitioners' methods of operating their schools are mandated by their religious beliefs, the First Amendment gives them no right to offer secular education in a manner that injures the rights of black students, let alone to demand tax benefits in support of their operations. Recognizing the weakness of their claims, Petitioners urge

this Court to construe the tax laws in their favor to avoid the constitutional issues.[41/] But no valid principle of statutory interpretation permits such a course.

1. Petitioners Have No First Amendment Right To Offer Secular Education In Schools That Discriminate Against Black Children.

The only First Amendment issue actually raised in these cases is Petitioners' claim that Congress cannot withhold tax subsidies because of their invidious practices. But Petitioners' arguments presuppose their success on a more starkly defined claim: that the First Amendment prevents Congress from proscribing racial discrimination in secular educational activities set up by a religious organization as an alternative to public edu-

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41/ See Brief for Petitioner Goldsboro Christian Schools, Inc. at 25; Brief for Petitioner Bob Jones University at 10-12.

cation. Amici suggest that this underlying assumption, essential to Petitioners' arguments, is groundless.

This litigation does not concern Petitioners' freedom to believe or to teach whatever they wish; Amici do not question their right to preach racial separatism. It does not even involve Petitioners' right to practice racial separatism in the purely religious functions of their organizations. Petitioners demand the right to expand racial discrimination into their secular educational business, a private enterprise they have set up to compete with the public schools.

The government's interest in preventing the harm Petitioners' discrimination inflicts outweighs Petitioners' right to inflict it even under the most rigorous tests of constitutionality. As a preliminary matter, however, Petitioners are not entitled to the most rigorous

scrutiny, because of the context in which their activities occur.

Petitioners ask this Court to extend the most stringent forms of First Amendment protection to a religious organization's conduct of a normally secular business. They claim that a religious group with a suitable calling can enter a field of business and erect its religious beliefs as a shield against neutral regulations that its competitors must obey for the protection of the public.

This Court has never held that the Free Exercise clause permits such assaults on business regulation. Free Exercise decisions of the past two decades have addressed state action unavoidably intruding on religious decisions in the lives of individuals,[42/] and regulations

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42/ See, e.g., Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406

(footnote continued)

restricting the fundraising and proselytizing functions of religious congregations.[43] But the Court has not recently given plenary consideration to the class of claims, commonly raised in state courts and lower federal courts, for religious exemption from neutral economic regulation of a normally secular business in which a religious group has chosen to engage.[44]

(footnote continued)

U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

43/ Larson v. Valente, 102 S. Ct. 1673 (1982); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

44/ See, e.g., State v. Heart Ministries, Inc., 227 Kan. 244, 607 P.2d 1102, appeal dismissed for want of substantial federal question, 449 U.S. 802 (1980) (home for children); Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970) (refusal to bargain with union); United States v. Kissinger, 250 F.2d 940 (3d Cir.), cert. denied, 356 U.S. 958 (1958) (excess production of wheat); Muhammad Temple v. City of Shreveport, 387

(footnote continued)

As Justice Traynor of the California Supreme Court once noted,

> Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, hospitals, farms, industrial and other commercial enterprises. Conceivably they may engage in virtually any worldly activity, but

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(footnote continued)

F. Supp. 1129 (W.D. La. 1974), aff'd mem., 517 F.2d 922 (5th Cir. 1975) (sale of frozen fish); Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), aff'd, No. 72-1826 (2d Cir. May 30, 1973) (unpublished order) (violation of copyright by religious theatrical group); Butler v. Kavanagh, 64 F. Supp. 741 (E.D. Mich. 1945) (manufacture of oleomargarine); State v. Fayetteville Street Christian School, 258 S.E.2d 459 (N.C. App. 1979) (child care center); Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App. 1977) (same). Cf. Church of Scientology of California v. Richardson, 437 F.2d 214 (9th Cir. 1971) (importation of misbranded diagnostic devices); Founding Church of Scientology v. United States, 409 F.2d 1146, 1161, 1163-64 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969) (pseudo-scientific nonreligious healing by religious group unprotected).

> it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. 45/

The state's power to regulate potentially harmful practices in such areas of economic activity normally receives great deference. When the state recognizes a danger, it is not obliged to convince the courts of the magnitude of the risk or the merit of a particular remedial approach. See, e.g., Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949); Olsen v. Nebraska, 313 U.S. 236, 246 (1941) ("There is no necessity for the state to demonstrate before us that evils persist...."). Even in the

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45/ Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 163 P.2d 704, 712 (1945), appeal dismissed, 331 U.S. 543 (1947). The Gospel Army case involved both regulation of solicitation and regulation of dealers in secondhand goods, as applied to a religious organization similar to the Salvation Army.

First Amendment context, neutral laws of general applicability may be enforced against the press without a showing of strict necessity. See Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972) (discussing prior cases); Associated Press v. United States, 326 U.S. 1 (1945) (Sherman Act).

Nor can the state be required to prove the absolute necessity for denying exemptions before including religiously managed businesses in a neutral regulatory scheme. Those entities cannot require the state to accept a higher level of risk to the public or to accommodate the regulatory system to their practices. The First Amendment was not designed to confer such competitive advantages on religious corporations engaged in a normally secular enterprise. See Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961) (plurality opinion); King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir.

1974); Giannella, Religious Liberty, Non-establishment, and Doctrinal Development, 80 Harv. L. Rev. 1381, 1398-1403 (1967).[46/]

These general observations are confirmed by settled law regarding regulation of the business of private education. Petitioners' decision to enter this field of commerce subjects them to a broad spectrum of state and federal laws that are not usually applied to the operation of churches, including minimum educational standards,[47/] occupational safety regula-

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46/ The danger of competitive advantage is extreme in this case. The consumer demand for segregated education remains distressingly strong. If only religious schools can offer that "service", and if they are free to offer it to customers who do not even share their religious belief in the necessity for discrimination, as both Petitioners do (see Joint Appendix in No. 81-1 at 68; Joint Appendix in No. 81-3 at A33-34), the religious schools enrollment may swell because of factors unrelated to their theological and pedagogical virtues.

47/ See, e.g., State v. Shaver, 294

(footnote continued)

regulations,[48] and minimum wage laws.[49] Private schools are also subject to the employment discrimination prohibitions of the 1964 Civil Rights Act, which expressly permits religious organizations to discriminate in employment on the basis of religion, but not on the basis of race.[50]

This Court has always coupled the right to establish private schools with the substantial authority of the state

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(footnote continued)

N.W.2d 883 (N.D. 1980); Shapiro v. Dorin, 99 N.Y.S.2d 830, 199 Misc. 643 (1950).

48/ See 29 U.S.C. §§ 651-678 (1979); 29 C.F.R. § 1975.4(c) (1981).

49/ See 29 U.S.C. § 203(s)(5); Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954) (religious publishing house).

50/ 42 U.S.C. § 2000e-2(e). See EEOC v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house). This demonstrates, as does I.R.C. § 501(i), Congress' express judgment that religiously managed businesses are no more entitled to engage in racial discrimination than wholly secular ones.

to regulate their operation. See Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). In Board of Education v. Allen, 392 U.S. 236, 245-47 (1968), this Court described the undoubted power of the government to regulate private education as a corollary of the schools' right to compete with public education: "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular function." Thus, this Court's prior cases explicitly confirm that Petitioners have chosen to operate in a field of business where the State necessarily has greater control over their activities.

Of course, even if Petitioners' institutional activities were entitled to the greatest measure of First Amend-

ment protection, the rights they claim would clearly be outweighed by the government's interest in preventing the harms Petitioners' conduct inflicts. Eradication of the badges and incidents of slavery is unquestionably a compelling government interest.

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with Brown, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment.

Regents of the University of California v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

In Runyon v. McCrary, 427 U.S. 160, 172 (1976), this Court held that racial exclusion by private schools "amounts to

a classic violation of [42 U.S.C.] § 1981." The private schools insisted that Congress' proscription of discriminatory conduct violated parents' First and Fifth Amendment rights of free association, parental control of child upbringing, and family privacy. But the Court rejected these claims, maintaining that the parents' rights must yield to the government's interest in securing racial equality under the Thirteenth Amendment. Id. at 179. The Court specifically denied that a First Amendment right to promote a belief in racial segregation could be translated into a right to practice racial exclusion. Id. at 176.

The Court reserved deciding the applicability of Runyon v. McCrary to religious schools, which were not before it. But precisely the same reasoning refutes Petitioners' claims. Petitioners' belief in racial separatism does not

entitle them to enforce it by rejecting or expelling black children. Conduct protected by the Free Exercise Clause is entitled to no greater protection than other conduct protected by the First Amendment.[51/] In either case, the burdens placed on asserted rights must be balanced against the government's interest in regulating injurious conduct. The outcome of that balance in the present case is evident: the destruction wrought by racial discrimination in education can only be prevented by outlawing that discrimination.

There is nothing novel or shocking in the conclusion that Congress can restrict Petitioners' freedom to act on

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51/ See Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981); id. at 659 n.3 (Brennan, J., concurring in part and dissenting in part); Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944); Linscott v. Millers Falls Co., 440 F.2d 14, 17 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

their religious beliefs. This Court has never accepted a Free Exercise claim of a right to inflict harm on others. See Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1879).[52] And this Court has denied protection even to fairly innocuous conduct to prevent highly generalized forms of harm.[53]

52/ Even in Wisconsin v. Yoder, 406 U.S. 205, 233-36 (1972), the case most favorable to Petitioners, the Court closely scrutinized the evidence to determine whether the religious conduct would "jeopardize the health or safety of the child, or have a potential for significant social burdens."

The Court ultimately concluded that Yoder had demonstrated the adequacy of his religiously mandated conduct "in terms of precisely those overall interests that the State advances in support of" its prohibition of that conduct. 406 U.S. at 235. Obviously, Petitioners could never make such a showing. They insist that the rights of others must be sacrificed to their own.

53/ See, e.g., United States v. Lee,

(footnote continued)

2. Petitioners Have No First Amendment Right To Federal Tax Subsidies, Regardless Of Whether They May Lawfully Practice Discrimination.

The actual claim Petitioners present in this case is not merely that their racial discrimination should be tolerated, but that the First Amendment compels the federal government to provide tax benefits to assist their operations. Petitioners' demand for subsidization is even weaker than their claim for a right to discriminate. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Maher v. Roe,

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(footnote continued)

102 S. Ct. 1051 (1982) (maintaining comprehensiveness of social security system); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (efficiency of crowd control); Braunfeld v. Brown, 366 U.S. 599 (1961) (providing common day of rest).

432 U.S. 464, 475 (1977) (footnote omitted).[54/]

Petitioners seek to escape this general principle by relying on Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board, 450 U.S. 707 (1981). Both cases held that a state unduly burdens religious freedoms when it denies unemployment benefits to individual workers by refusing to recognize religious objection to working conditions as "good cause" for declining employment.

Those cases are wholly inapplicable here. Both dealt with the state's with-

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54/ As this Court pointed out in Maher, the constitutional right of a parent to send his children to private schools imposes no obligation whatsoever on the state to contribute to the cost of that education. Id. at 476-77. The state may even withhold such aid from parents whose religious convictions require them to educate their children in sectarian schools. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788-89 (1973); Norwood v. Harrison, 413 U.S. 455, 462-63 (1973).

drawal of benefits because of conduct that the state had asserted no interest in regulating outside the benefit context. In Sherbert v. Verner, the employee was fired because she was unable to work on Saturday, her religious Sabbath. The Court carefully noted before commencing its inquiry that her "conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation." 374 U.S. at 403. Indeed, there was no evidence that other employees were refusing Saturday work for nonreligious reasons, or that the state had expressed any interest in preventing them from doing so. Id. at 407. Similarly, in Thomas the state's refusal to recognize conscientious objection to weapons manufacture as "good cause" for leaving employment was not based on any desire to discourage such conduct. Rather, the state relied

on unsubstantiated dangers that permitting religious exemptions in general might induce employers to question job applicants about their beliefs, or might increase unemployment. These cases provide no support for the theory that government must also avoid indirect burdens on religiously motivated instances of conduct that threatens harm to third persons, and that would be unlawful for nonbelievers to engage in.

Furthermore, the Court made clear in Thomas that even where Sherbert applies, an individual's claim for a religious exemption could be overcome by a compelling state interest. 450 U.S. at 718. Incidental burdens on religious activity must be balanced against the legitimate government aims that create them. United States v. Lee, 102 S. Ct. 1051, 1056 (1982). The federal government's overriding interest in refusing to subsidize Petitioners'

racist practices results both from its affirmative efforts to protect black children, and from its statutory and constitutional duty to withhold approval and support from private discrimination. Thus, "[t]he incidental burdens felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned." Gillette v. United States, 401 U.S. 437, 462 (1971). Even assuming that the balancing test of Sherbert v. Verner were applicable, Petitioners' Free Exercise claims to tax benefits would be outweighed by government interests of the highest order.

3. This Court Should Not Imply Exemptions For Petitioners In Order To Avoid Deciding Their Constitutional Claims.

Whether or not the Court agrees with Amici that Petitioners' Free Exercise

claims are wholly insubstantial,[55/] the categorical language of the 1866 Civil Rights Act and Section 501(c)(3) itself affords no foothold for the claim that Congress intended that religiously motivated segregation academies receive more favorable treatment than socially motivated ones. Since no reasonable interpretation of the statutes is available that would justify such a distinction, Petitioners rely on an extraordinary rule of statutory construction, arguing that Congress cannot be assumed to exclude such religious schools from exempt status, unless Congress clearly expresses its affirmative intent to apply the same rule to them as to all others.

Petitioners rely on a single case for this favorable canon of construction,

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55/ Petitioners' Establishment Clause claims are patently frivolous. See Gillette v. United States, 401 U.S. 437, 450-51 (1971).

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). In that case, the Court considered the National Labor Relations Board's recent decision to extend jurisdiction over lay teachers in parochial schools. The Court observed that the Board's responsibility to police collective bargaining conduct would entangle the Board in all aspects of school management, and would continually enmesh the Board in investigating the good faith of church authorities' claims that various educational policies displeasing to the teachers and their union were religiously mandated. Given the pervasive danger of entanglement, the total absence of evidence that Congress had ever considered such an intrusion desirable, and the fact that Congress had carefully modified customary labor law to accommodate the religious interests of employees in religious hospitals, the Court concluded that

Congress did not contemplate Board jurisdiction over parochial school teachers.

The unique factors that justified the Court's interpretation of the National Labor Relations Act are wholly absent here. First, Petitioners' constitutional claims are simply too insubstantial to require the suggested construction. Indeed, construing the Code to grant Petitioners exemptions would raise far graver constitutional questions than it would avoid. Furthermore, the Internal Revenue Code itself contains a clear indication that Congress, after mature deliberation, viewed religious racism as entitled to no more favorable tax treatment than lay racism. Section 501(i) expressly permits religious social clubs to retain their tax exemptions while engaging in religious discrimination, but not in racial discrimination or in religious discrimination as

a subterfuge for racial discrimination.

More importantly, the Catholic Bishop rule of construction is inappropriate where litigants rely on simple Free Exercise claims rather than unanticipated entanglement problems. Petitioners' Free Exercise arguments are indistinguishable from a broad spectrum of assertions that parties feel religiously compelled to engage in some form of unlawful or antisocial conduct, and that the statutes are too generally phrased to be read as expressly covering their actions.[56/] Surely Congress

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56/ Litigants frequently demand First Amendment exemptions from statutes and rules whose draftsmen did not expressly anticipate such claims. See, e.g., SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976) (securities fraud); United States v. Huss, 482 F.2d 38 (2d Cir. 1973) (refusal to testify against coreligionist); United States v. Best, 476 F. Supp. 34 (D. Colo. 1979) (trespassing on government property); United States v. Thompson, 466 F. Supp. 18 (W.D. Pa. 1978), aff'd, 588 F.2d 825 (3d Cir. 1978) (union

(footnote continued)

is not obliged in passing every regulatory statute and every criminal law to state that no person, including persons religiously motivated, shall engage in certain conduct.

Finally, the danger of entanglement in the present context requires denial of Petitioners' claimed exemptions, not allowance. This Court has made clear in Runyon v. McCrary, 427 U.S. 160 (1976), that secular private schools are forbidden to indulge in racial discrimination by the 1866 Civil Rights Act. Such deliberately unlawful conduct compels denial of tax exemptions. Creating a "Free Exer-

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(footnote continued)

official's receipt of Christmas gift from employer); Turner v. American Bar Association, 407 F. Supp. 451, 481 (N.D. Tex. 1975) (unauthorized practice of law); Welch v. Kennedy, 319 F. Supp. 945 (D.D.C. 1970) (sending medical supplies to enemy nation). In the past, as in the cases cited, the courts have not construed statutes to avoid deciding such claims.

cise" immunity from the general rule would therefore plunge the Internal Revenue Service into endless investigations of the sincerity of segregated schools clamoring for tax exemptions. This is precisely the sort of inquiry the Court sought to avoid in Catholic Bishop. See 440 U.S. at 502.

This potential for entanglement is graphically illustrated by the record in No. 81-1. The evidence compiled, through the close examination by government attorneys that such cases necessarily require, persuasively indicates that the admission policies of Goldsboro Christian Schools are not governed by sincere religious convictions.[57/] Courts have

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57/ The school does not require that its students subscribe to any particular belief, Joint Appendix in No. 81-1 at 68, 85-86; its student body ranges among numerous sects of Protestant and non-

(footnote continued)

been forced to engage in similarly intrusive inquiries so long as they have held open the possibility of a religious exemption from the 1866 Civil Rights Act.[58/]

Thus, the special circumstances justifying the presumption against coverage of religious activities in Catholic Bishop are absent in the present

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(footnote continued)

Protestant Christianity and also includes children adhering to a non-Christian religion or to no religion at all, Id. at 69-70; contrary to its claimed religious belief in educating only the "Japethite" race, the school has admitted "Hamite" children without hesitation so long as they were not black, Id. at 83, 85-87; id. at 91-92; and both the school's founder and its principal trace their opposition to admitting black children to the current political climate in the South, Id. at 84; id. at 90, 92-93.

58/ See Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1063 (1978); see id. at 323-24 (Goldberg, J., concurring).

case. Section 501(c)(3) is not reasonably susceptible to importing a special rule for schools whose religious beliefs require racial discrimination, and the Court cannot avoid Petitioners' constitutional claims by implying an exception in their favor.

CONCLUSION

For the reasons set forth above, the decisions of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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MOTION FILED
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Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1982.

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

BOB JONES UNIVERSITY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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Pursuant to S. Ct. R. 36.3, consent to filing of the *amicus* brief having been orally refused by counsel for one of the petitioners, the National Association of Independent Schools ("NAIS") hereby moves for leave to file the attached brief *amicus curiae*. The *amicus*, NAIS, is an association of "independent schools" constituting over 900 private elementary and secondary schools that are almost entirely independent of church or public control or support; in several of the schools, a majority of the student enrollment are minority students. Consequently, NAIS has a strong stake in the policy considerations to be applied in the decision of these two cases. The brief attached is submitted for the purpose of presenting to the Court the policies and experience of NAIS and its members in administering non-discriminatory private schools as an aid to the statutory and constitutional issues of interpretation involved in this case. The position presented therein is in support of the position that will be urged by William T. Coleman, Jr., Esq., invited by this Court to participate as *amicus curiae*, whose brief is due August 25, 1982.

Accordingly, *amicus* NAIS respectfully moves that leave be granted to file the attached brief.

Respectfully submitted,

NATIONAL ASSOCIATION OF
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August 25, 1982

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RESPONDENT.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS AS AMICUS CURIAE

Interest of Amicus

The National Association of Independent Schools ("NAIS") is a nationwide association of nearly 900 private elementary and secondary schools that are almost entirely independent of church or public control or support; these schools enroll about

1% of the roughly 46 million elementary and secondary school students in the country; all private schools enroll about 10%. NAIS member schools range in size from 27 students to 3,600 students; in several schools, a majority of the student enrollment are minority students, including one all-black boarding school. NAIS and its members consequently have comprehensive knowledge of and experience with enrollment of minority students, including blacks. As stated in the accompanying motion, NAIS believes that presentation of its experience can assist the Court in its determination of the issues involved.

Summary

NAIS, an association of nearly 900 independent private elementary and secondary schools, has long supported, as a matter of good educational policy, the constitutional prohibition against racial discrimination in educational institutions. The public policy to that effect should be uniformly applied to all schools, secular or religious, public or private. In providing income tax exemptions and charitable contribution deductions for nonprofit schools, the Congress, it would appear, intended that vital principles of public policy, such as the bar to racial discrimination, be infused into the privileges afforded under the tax laws to charitable organizations and the administrative obligations of the Internal Revenue Service under those laws.

Argument

I. Determination of Tax-Exempt Status under Section 501(c)(3) of the Internal Revenue Code Incorporates the Common Law Concept of "Charitable" Organizations Benefitting Society as a Whole.

The legislative history of section 501(c)(3) of the Internal Revenue Code ("Code") is being amply elucidated by the brief of William T. Coleman, Jr., in this case. That history supports the position of the Internal Revenue Service, as exemplified by

Treas. Reg. §1.501(c)(3)-1(d)(2), and of William T. Coleman, Jr., that the common law concept of "charity" requiring benefit to society at large in all instances, was intended to be incorporated in the statute and does indeed infuse its interpretation and administration. See Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A.J. 525 (1958); Sacks, *The Role of Philanthropy: An Institutional View*, 46 Va. L. Rev. 516 (1960). To the extent that courts have heretofore alluded to this subject, they have manifested ready agreement with that position. *Helvering* v. *Bliss*, 293 U.S. 144, 147 (1934); *United States* v. *Proprietors of Social Law Library*, 102 F.2d 481, 483 (1st Cir. 1939); *Green* v. *Connally*, 330 F. Supp. 1150, 1156-1164 (D. D.C. 1971), *aff'd per curiam sub nom.*, *Coit* v. *Green*, 404 U.S. 997 (1972).

Furthermore, the concepts of "charity" and "public benefit" incorporate general concepts of policy. It is a fundamental principle that all charitable trusts are subject to the general law requirement that the purpose of the trust may not be illegal or contrary to public policy. *Ould* v. *Washington Hospital for Foundlings*, 95 U.S. 303, 311 (1887); Restatement, Trusts (Second), Section 377, Comment c (1959). It is, therefore, proper for the Internal Revenue Service and this Court to inquire into and apply the appropriate public policy for requisite admission standards to private schools. See Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 Tax. L. Rev. 477 (1981).

II. Public Policy Manifested by the Constitution Requires that Private Schools Refrain from Discrimination on Racial Grounds.

Amendment Thirteen to the Constitution bars discrimination by states on the basis of race. The Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. §1981, was enacted in furtherance of that amendment. And, in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits private, nonsectarian schools from denying admission to applicants

because they are blacks. Thus, application of this constitutional mandate and congressional policy barring racial discrimination by private schools, could not be clearer, far antedating and justifying the adoption of that same policy for tax purposes by the Internal Revenue Service.

NAIS urges that there is no constitutional bar to application of that policy equally to sectarian schools, but defers to the brief of William T. Coleman, Jr., Esq. for presentation of that point.

III. NAIS Experience Confirms that the Constitutional Requirement of an Anti-Discrimination Educational Policy is Wholly Consistent with Educational Objectives and Needs.

NAIS has long been committed, by official action, to the principle of non-discrimination in admission of students and employment of teachers and other personnel as a vital educational principle.[1] In 1976, NAIS filed an *amicus curiae* brief with this Court in support of two black families who were charging racial discrimination in the admission of their children by two segregated private schools in Virginia. *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

John C. Esty, Jr., President of NAIS, testified on February 21, 1979, before the Subcommittee on Oversight of the Committee on Ways and Means, U.S. House of Representatives, in support of the purposes and objectives of a proposed revenue procedure designed to provide administrative tests for implementing Rev. Proc. 72-54, 1972-2 C.B. 834, although several of the particular procedures proposed were found to be unworkable. Mr. Esty continued to assist in the development of feasible and fair guidelines in correspondence with the

[1] For over a decade, an applicant for admission to NAIS must submit a statement "that the school's policies provide for admission of students and employment of personnel without regard to race or color (if not contained in the school catalogue)." NAIS directors reaffirmed these policies in a major statement to members in June 1974.

Commissioner of Internal Revenue, Jerome H. Kurtz. Finally, on February 24, 1982, the Board of Directors of NAIS adopted a resolution approving the legal obligation of the Internal Revenue Service to deny tax exemption to racially discriminatory schools, both religious and secular. This position is founded upon the conviction that racial discrimination is not only socially inadmissible but also educationally deleterious.

NAIS and its members acknowledged their responsibilities to the Internal Revenue Service in conforming to its administrative policy of nondiscrimination announced in 1970[2] and implemented by procedures promulgated in Rev. Proc. 72-54, *supra*, and Rev. Proc. 75-50, 1975-2 C.B. 587. In general, conformance was achieved without undue difficulty. And, when the Internal Revenue Service proposed revised, more stringent procedures,[3] partly in response to existing and threatened litigation, NAIS supported the basic objectives and procedures, but did urge modifications to meet practical difficulties. Its principal objections related to the apparent establishment of inflexible presumptions and numerical standards which failed to afford a school an adequate opportunity to qualify for exemption upon the basis of its own experience and circumstances. NAIS thus does maintain that the procedural implementation of the general concepts exemplified by the opinion in *Green* v. *Connally*, *supra*, requires especial sensitivity by the Internal Revenue Service. Several of those proposed modifications were subsequently reflected in a revised proposal,[4] and NAIS, through its President, as stated above, testified in general support thereof but suggested further modifications; no revision has yet been adopted, in light of Congressional prohibitions.

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[2] I.R.S. News Release, July 10, 1970, 70 P-H ¶55,209; I.R.S. News Release, July 19, 1970, 70 P-H ¶55,230; Rev. Rul. 71-447, 1971-2 C.B. 230. For development of this policy, see Thrower, *Tax-Exempt Status of Private Schools*, 35 Tax Lawyer 701 (1982).

[3] 43 Fed. Reg. 37296 (August 22, 1978).

[4] 44 Fed. Reg. 9451 (February 13, 1979).

NAIS members have vigorously supported for all private schools adherence to the strong public policy of nondiscrimination and realize the need for its proper implementation by the Internal Revenue Service in connection with the tax laws, as well as its application in other areas. NAIS members have not been adversely affected by conformity to reasonable rules of administration, which NAIS believes strengthen the achievement of desirable educational objectives and needs. Such considerations, NAIS urges, should be given substantial weight in deciding the interpretive issues here involved. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The position of NAIS was well summarized by Mr. Esty's predecessor, Cary Potter, when, at the time of the litigation in *Runyon* v. *McCrary*, *supra*, he wrote as follows on the presumed right of private schools to discriminate racially:

> "The private school world in general does not support any such right. Private schools do believe that they are fully entitled to determine their own philosophy, to design the curriculum and choose the teaching materials and methods they consider most effective, and to admit students who they believe, and whose parents believe, will benefit from the education offered. But they do not believe that race as a criterion for admission is one that is in accord with the public interest or the public policy.
>
> The position taken by a minority of private schools . . . that there is a right to discriminate on grounds of race, has been a thorn in the side of the private school world as a whole for some time and we are hopeful that the Court will settle the issue for once and for all."

NAIS believes that it is important for it to be stated and repeated publicly that the private school world in general does not support racial discrimination.

Conclusion

For the reasons stated herein and in the brief of Special Counsel, *amicus* NAIS urges that the decisions below be affirmed.

Respectfully submitted,

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August 25, 1982

Amicus Brief

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Nos. 81-1 and 81-3
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

BOB JONES UNIVERSITY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (COLPA) AS AMICUS CURAE

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Interest of Amicus Curiae

The National Jewish Commission on Law and Public Affairs ("COLPA") is a volunteer association of attorneys and social scientists organized to represent the interests of the Orthodox Jewish community in matters arising under the Free Exercise and Establishment Clauses of the First Amendment to the Constitution, and in related areas involving the right to worship and observe traditional religious customs and practices. In this capacity, COLPA has appeared as amicus and/or represented intervenors in numerous cases before this Court, including Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970).

In submitting this brief, COLPA wishes to make it clear that it strongly disapproves and condemns the racial practices of both petitioners. As we have testified previously,

> ". . . [I]t is contrary to Jewish religious principles to discriminate against [any person]. . . on the basis of race or skin color. No Jewish organization has ever been

> heard to have closed its doors to any Jew based on race. We know too well the invidious effects of racial discrimination, and will not lend ourselves to any scheme that encourages or perpetuates such a social and moral evil." (Statement of National Jewish Commission on Law and Public Affairs, Hearings Before the Subcommittee on Oversight, of the Committee on Ways and Means, 96th Cong., 1st Sess., on Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools (Feb. 20, 21, 1979) 507-508.)

However, notwithstanding its unequivocal position on matters of racial discrimination, the Orthodox Jewish community is concerned by the broad implications in the opinions below which indicate that organizations created by minority groups in pursuit of the Free Exercise of their religions may be denied tax exemption and required to pay taxes, not for doing something illegal, but merely because they refuse to conform to the "policies" of the majority. The loss of tax-exempt status would undermine the economic viability of such organizations and, hence, their ability to exercise their First Amendment rights.

For example, many religious bodies have time-honored practices and traditions which prescribe different roles for men and women during worship and related activities, including education. While these distinctions are not perceived by their adherents as discriminatory in purpose or effect, it is conceivable that the lower courts might attempt to interpret the decisions below in the present cases to require the Internal Revenue Service to deny tax-exempt status to any entity which fails to conform to the evolving federal policies on the treatment of women. This could include every orthodox and many conservative Jewish synagogues and yeshivas, the Catholic Church, Moslem mosques, Far Eastern temples and many Protestant churches.

We protest a rationale which could all too easily lead to such results. It is not the business of Government to require religious groups to conform to social "policies."

Joining in this brief are the following organizations, which represent a broad cross-section of the orthodox Jewish community in the United States:

Agudath Israel of America
National Council of Young Israel
Rabbinical Council of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

ARGUMENT

THE INTERNAL REVENUE SERVICE MAY NOT DENY TAX-EXEMPT STATUS TO A BONA FIDE RELIGIOUS ORGANIZATION WHICH DOES NOT VIOLATE ANY SPECIFIC LAW MERELY BECAUSE IT DOES NOT CONFORM TO FEDERAL SOCIAL POLICY

We agree with and strongly urge upon the Court the reasoning of the dissenting judge in Bob Jones University in the Fourth Circuit. As a result, we will restrict our comments to a few points which appear to warrant some short elaboration.

A. Congress did not intend to Restrict Tax-Exemption to Religious Organizations which also Meet some Common-Law Concept of "Charity".

Section 501(c)(3) of the Internal Revenue Code exempts a long list of entities, of which three are "religious," "educational" and "charitable." Others include "scientific" and "literary" organizations, as well as entities organized to test for public safety or foster certain types of sports activities. Despite the plain meaning of the statute, which connects these separately listed items disjunctively, with the word "or," the lower courts have concluded that Congress really meant to exempt only "charitable" organizations, and that the other specifications were, perhaps, merely examples of such charitable entities. The lower courts therefore decided that Congress used a phrase 46 words long, when only one was needed, and that it did not mean "or" when it said "or."

The only authority cited for this

conclusion was a 1939 Committee report,1/ to the effect that each of the categories in the statutory list benefitted the public by promoting "general welfare." But this statement in the Report was hardly a complete explanation. For that, one may refer to this Court's historical summary of both income and property tax exemptions for religious entities in Walz v. Tax Commission of the City of New York, 397 U.S. 664, 673-674.

The Court pointed out that the exemption of religious entities2/ from federal income taxes goes back to the very origins of federal legislation on the subject--at least to 1894

1/ H.R. Rep. No. 1820, 75th Cong., 3d Sess. 19 (1939).

2/ Although the exemptions in these cases may have been requested and, in part, analyzed under the "educational" category, the issue in this case arises because the institutions were also inherently religious in purpose and function. Without that element, those cases would stand on entirely different footings. See NLRB v. Bishop Ford Central High School, 623 F.2d 818, 823 (2d Cir., 1980), petition for cert. filed Dec. 22, 1980 ("It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses. . .").

(i.e., 45 years before the cited Committee Report) and, in a footnote, recognized the distinction between exemptions based on "religious" and "eleemosynary" purposes (397 U.S. at 676-677:

> "For so long as federal income taxes had any potential impact on churches--over 75 years--religious organizations have been expressly exempt from the tax."4/

> 4/ Act of August 27, 1894, §32, 28 Stat 556. Following passage of the Sixteenth Amendment, federal income tax acts have consistently exempted corporations and associations, organized and operated exclusively for religious purposes along with eleemosynary groups, from payment of the tax. Act of Oct. 3, 1913, §11G(a), 38 Stat 172. See Int Rev Code of 1954, §501, et seq., 26 USC §501 et seq." (Emphasis added)

In the case of property taxes, the Court traced the exemptions for religious entities back into pre-Revolutionary days, and stated, "Few concepts are more deeply embedded in the fabric of our national life. . .".

The Court specifically rejected "good works" as the underlying rationale of exemptions:

"Grants of [tax] exemption historically reflect the concern of authors of constitutions and statutes as to latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.

* * *

"We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others--family counselling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need.

"As public-sponsored programs enlarge, private aid from the church sector may diminish. The extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency. To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions." (Emphasis added.)

The "good works" rationale also collapses when one considers the exemption for sports activities. While it may be possible to define "charity" to include the "fostering" of sports competitions, there is a parenthetical limitation in the statute to those which do not provide athletic facilities or equipment. If fostering sports is a form of "charitable" activity, the providing of equipment or facilities should be just as charitable. This limitation demonstrates that each exempt category in §501(c)(3) has its own characteristics and purposes, and that the concept of charitable "good works" is not the universal touchstone.

Hence, the lower courts' conclusions that Congress intended to grant tax exemptions to religious organizations only if they otherwise engaged in charitable, or "eleemosynary" activities, is unsound. In Walz, that contention has already been rejected by this Court, and it should again be rejected in this case.

B. Having Granted Tax-Exemptions to Religious Entities in General, the Government may not Deny Exempt Status to those Religious Groups which Fail to Conform to the Social Policies of the Majority.

The purpose of the First Amendment is to protect minorities from the tyranny of the majority. The Government represents and acts for the majority, but the majority may not use its power to control the Government to destroy the constitutional rights of the minority, whether through taxation or otherwise. Tax-exemption is a status without which most non-profit organizations could not exist in today's world. The purpose of the First Amendment and its limitation on the powers of the majority would be frustrated if tax exemption and, with it, economic viability, could be granted to or withheld from the minority by the majority merely because the minority, in pursuit of its religious rights, refuses to conform to the social practices of the majority. If the majority could so behave, the First Amendment would be meaningless.

Thus, the courts have uniformly held that if the Government accords some privilege, right, or benefit to a class in general, it may not withhold or limit that privilege, right or benefit to an individual member of that class merely because that member refuses to forego rights or privileges guaranteed under the First Amendment. The Government just may not put its citizen to such a choice.

For example, in Speiser v. Randall, 357 U.S. 513 (1957), in which tax exemption was denied because of failure to sign a loyalty oath, this Court held that the tax-exemption could not be conditioned on a surrender of First Amendment rights of free speech. In Sherbert v. Verner, 374 U.S. 398 (1963), in which an employee who refused to work on his Sabbath was denied unemployment compensation by the State, this Court held that the First Amendment did not permit the State to force a citizen to choose between exercising his religion and the receipt of unemployment compensation benefits. And in Michaelson

v. Booth, 437 F. Supp. 439 (E.D.R.I., 1977), in which municipal elections were scheduled on a religious holiday, it was held that a local government could not force a citizen to choose between exercising his right to vote and observance of his religious practices, and the government had to make reasonable accommodations to permit citizens to vote in a manner that would not force them to violate their religious beliefs.

The principle, then, is well established. The First Amendment does not allow the Government to force minorities to conform, to surrender their diversity and assimilate to the undifferentiated masses, as a condition of tax-exemption. A contrary rule would make a mockery of the First Amendment.3/

3/ The lower court's reliance on the principle in cases like Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958), disallowing deductions for payments which are illegal and contrary to public policy, is misplaced in this context. No First Amendment issue was involved in those cases, and the payments were clearly illegal.

Different rules might well apply if it had been determined that the acts of the petitioners herein constituted crimes or otherwise violated specific laws. In that case, such laws would have to be tested to determine if they reflected a sufficiently compelling Government interest, such as "clear and present danger", to warrant overriding religious practices and rights. E.g., Reynolds v. United States, 98 U.S. 145 (1878)(prohibiting polygamy). But that situation just did not occur in these cases. No laws prohibit what petitioners do. And the Internal Revenue Service cannot nullify the guarantees of the First Amendment in the absence of such laws.4/

4/ Even if the activities of the organization violated specific laws, the remedy would appear to be prosecution under those laws. Denial of tax exemption should not be the proper remedy in the case of bona fide religious organizations. Thus, polygamy may be prosecuted or enjoined, but the church should nevertheless retain its exemption from tax as a bona fide religious organization.

C A Tax Exemption is not the Equivalent of Governmental Support of the Organization.

The lower courts in both these cases concluded that tax exemption somehow involves the Government in the activities of the entity itself, just as though the Government was subsidizing the entity. That line of reasoning is fallacious, and was specifically rejected by this Court in Walz.

The premise that tax exemption is a subsidy to the entity is a confusion of concepts. Clearly, no money runs from the Government to the entity merely because it is exempt. Quite the contrary, if it is not exempt, funds will run from the entity directly to Government. Exemption merely creates a neutral condition, with neither the Government subsidizing the organization nor the organization supporting the Government.

Of course; if the Government removed the exemption, the entity would be required to pay large sums to the Government and, in an indirect sense, the Government's forebearance

in collecting that sum is a "benefit" to the entity--it has more funds for its religious activities if it is exempt than if it is not. But by that reasoning, the Government could constitutionally tax 90% or 99% or conceivably even 100% of the organization's income or property, and its forebearance from doing so is just as much--or even more--a "benefit" as its forebearance to tax at the more customary lower rates. The argument that forebearance in taxing a religious activity is a "benefit" is based on a semantic error in the meaning of the word "benefit". It is like saying that your enemy "benefits" you when he stops punching you in the nose. Only under a most distorted view would that be considered a "benefit".

The true nature of a tax-exemption was considered at length in Walz, supra, which raised the question whether property tax exemptions of churches violated the Establishment Clause. Clearly, the Establishment Clause prohibits the government from giving any

financial "benefits" to any church. This Court held that a tax exemption is not a benefit, but a mere act of neutrality (397 U.S., at 674-676):

> "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'"

While that case involved property taxes rather than income taxes, the Court drew no distinction between the two. It expressly noted that property tax exemptions and income tax exemptions have the same purpose and economic consequences (397 U.S. at 676-677):

> "[Income tax exemption] is an 'aid' to churches no more and no less in principle than the real estate tax exemption granted by the States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality

> toward churches and religious exercise generally so long as none was favored over others and none suffered interference."

The decision of the lower courts in this case not only ignored this explanation, but also missed the warning in the last sentence quoted above, against favoring some over others, for they would favor those churches which conform over those which refuse.

To hold that tax exemption is a "benefit" which involves the Government in the activities of the organization goes much too far. If that concept is correct, the Internal Revenue Service will be forced to deny exemption to <u>any</u> entity--and not just those listed in §501(c)(3)--which operates in a manner contrary to national policy. The list of tax exemptions that would have to be lifted would be endless: any pension plan which covers employees of employers who discriminated against blacks, women, handicapped or the aged (Code §§401, 501(c); unions whose seniority rules perpetuate past discriminations (Code §501(c)(5));

social clubs (Code §501(c)(7); fraternities (which ones did not discriminate in the past?) (Code §501(c)(8) and (10)); cemetery companies (§501(c)(13); and even homeowners associations (§528).

The Internal Revenue Service is not, and cannot, be the Government's tool for social engineering. Congress did not intend tax exemption as a benefit in the sense used by the lower courts, and it is not the majority's cudgel for beating the minority until the latter acts in the manner the former from time to time happens to think morally or socially desirable.

SUMMARY

We underscore our repudiation of the practices of the petitioners in these cases, and regret that it is necessary--as it often is when difficult Constitutional issues are involved--to defend the rights of those with whom we so strongly disagree.5/ But the

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5/ In some respects, the real difficulty in these cases lies in the findings of the lower (footnote continued)

Constitution gives each of us the right to dissent, to be different, to believe that the

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(footnote 5 continued)

courts (in Goldsboro Christian Schools, more of an assumption than a finding) that racial discrimination was based on a bona fide theological belief. If these cases could be retried--and on this issue, Goldsboro Christian Schools probably can be--the bona fides of that belief should be tested. Too often religion has been used as a blind excuse for engaging in the grossest and most repugnant behavior. Where religion is merely a pose (e.g., the so-called "mail order churches" whose principle purpose appears to be to claim property tax exemptions or quasi-political fronts feigning to be religious movements), it may be a sham not entitled to First Amendment protections. In this case, there may still be a question whether the religious beliefs were the real source of the discriminatory practices, or merely a pretext for doing what the parties were determined to do, regardless of the legal and moral restrictions. Even in the case of Bob Jones University, does the weight of the evidence establish that the current leadership and membership are actuated by the purported theological justification for anti-black behavior, or are the obscure theological references merely convenient excuses? While such inquiries may be extremely difficult and sensitive, they are permitted--indeed, if the protections of the First Amendment are not to be obliterated by abuse, they may even be necessary. Nothing in the Court's decision in this case should foreclose future inquiry into this factual issue by the courts.

others are wrong. As long as a religious organization does not do something actually illegal, the Internal Revenue Service may not take away that right.

* * *

Much Madness is divinest Sense--
To a discerning Eye;
Much Sense--the starkest Madness--
'T is the Majority
In this, as All, prevails--
Assent--and you are sane--
Demur--you're straightway dangerous--
And handled with a Chain--

(From "The Complete Poems of Emily Dickenson" (1929))

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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UNITED STATES OF AMERICA,
Respondent

BOB JONES UNIVERSITY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS IN SUPPORT OF RESPONDENT

The North Carolina Association of Black Lawyers moves this Court, pursuant to Rules 36 and 42 of the Rules of the Court, for leave to file the attached brief *amicus curiae.*

Because Movant wishes to present views in support of the position of respondent (as stated in the Court of Appeals for the 4th Circuit and in its brief on the pe-

tition for certiorari to this Court) the appropriate time for making this motion would appear to have been prior to the formal filing of respondent's brief on March 3, 1982. However, in that brief respondent has repudiated its previous position with respect to a basic substantive issue in this case—the appropriate interpretation of Section 501(c)(3) of the Internal Revenue Code with respect to tax exemptions to racially discriminatory educational institutions. This highly unanticipated development does not seem to be envisioned by Rule 36. Arguably a true "respondent's" brief, that is one defending the judgments it won below, has not yet been presented to the Court. In these unique circumstances, movant, North Carolina Association of Black Lawyers, respectfully asks this Court to deem that movant's motion and brief have been presented to the Court within the time intended by Rule 36. Alternatively, the North Carolina Association of Black Lawyers respectfully moves the Court for leave to submit the accompanying brief amicus curiae out of time, in light of the extraordinary circumstances recited herein, and in light of the crucial public interest resulting therefrom. Movant has acted expeditiously after the developments of March 3rd when the respondent's ultimate brief dated "February 1982", was filed and March 4th when its draft brief dated "January 1982" was filed at the direction of the Court. Movant's counsel has become familiar with the record and all documents filed herein up to March 8th. Although deeply concerned with the outcome of these cases (for reasons stated in the accompanying brief at pp. 1-2), movant had until the March developments been content to have its concerns presented (as they had been below, and in the respondents' brief on the petition for certiorari) by the United States, and by certain other amici who had earlier appeared.

Movant was especially concerned by the statement contained in the significant filing of March 8, 1982, by counsel for petitioner, Goldsboro Christian Schools, containing the following statement to a Congressional Committee by

R. T. McNamar, Deputy Secretary of the Treasury: After reciting displeasure with an earlier draft of respondent's brief, Mr. McNamar stated that even a second draft received by him on December 29, 1981 "was still based on the theory that the Service [IRS] could determine that certain Federal public policies could be used as a precondition for obtaining and retaining tax exempt status. Given two tries, there was apparently no legal theory that would permit the Service to deny tax exemptions on the basis of racial discrimination without also giving the authority to deny or revoke exemptions on other grounds." (Petitioner, Goldsboro Christian Schools, Filing of March 8, 1982, p. 4).

Movant is convinced that there is demonstrably such a legal theory, and that it has not been presented to this Court in its full strength by any party or *amici* herein. Without unnecessary duplication of matter already before the Court, movant presents such a theory as decisive in these cases in the accompanying brief *amicus curiae.*

For this reason movant, North Carolina Association of Black Lawyers, respectfully moves this Court pursuant to Rule 36.3 for leave to file the accompanying brief *amicus curiae.*

Movant, North Carolina Association of Black Lawyers, has orally asked the consent to file this brief of counsel for each petitioner, Bob Jones University, and Goldsboro Christian Schools, and they have declined to provide their consent. Movant also orally asked the consent of the Acting Solicitor General, counsel for respondent herein. He likewise declined to provide consent, but stated that he would not oppose this motion.

Respectfully submitted,

JOSEPH A. BRODERICK
Attorney for Movant,
North Carolina Association
of Black Lawyers

March 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1 and 81-3

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY,
Petitioner

v.

UNITED STATES OF AMERICA

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF AMICUS CURIAE

Amicus, North Carolina Association of Black Lawyers, is deeply and intimately concerned in the outcome of these cases, particularly *Goldsboro Schools v. United States*, 81-1. Members of the Association include attorneys who practice in Goldsboro and its environs in Eastern North Carolina. While members of the Association have clients and associates who are parents of children in the Goldsboro area, the Association's interest in these cases is deeper and broader than such geographical limits.

The member attorneys of the North Carolina Association of Black Lawyers have been in the forefront of the legal and social struggle of the past three decades for

civil rights in North Carolina, particularly against racial discrimination, using as their main weapon the tools of the law. They had been encouraged by the slow but unmistakable easing of racial tensions in North Carolina, and by what seemed to be the long sought beginnings of an era in which men and women would replace decades of racial bigotry and distrust with mutual respect. The Association and its members over the years have had close association with North Carolina Central University School of Law. In its inception an all-black institution, it has been for years the most integrated professional school in the United States with approximately 60% black and 40% white students working side by side. This institution's interracial collaboration in student body, faculty and alumni, has been a model for all who aspire to a racially healthy and collaborative North Carolina and America.

But in the folds of these two cases are not only the halting of gains, but the threat of a lunge back to the recent past of racial contempt and inhuman indignity. The possibility that the law of the land could once again throw its cloak of "respectability" around racial discrimination is the spectre the Association and its members should like to combat herein, once again using the tools their profession has given them.

As stated above, the principal interest of the North Carolina Association of Black Lawyers is in the *Goldsboro* case. However, no one should misjudge the stunning effect in North Carolina of this Court's approval of a governmental racial tax bounty in the neighboring state to an educational celebrant of undisguised racial disdain. The Association's interest in the *Bob Jones University* case is thus considerable and justified. For here too an approved United States government tax bounty would restore to the cause of racism in our area a most valuable resource one would have thought it had lost—the perception of "respectability" that our society bestows upon "legality."

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, North Carolina Association of Black Lawyers, urges affirmance of the judgments of the Court of Appeals for the Fourth Circuit in these two cases in which this Court granted certiorari on September 8, 1981, substantially for reasons set forth in the respondent's brief on the petitions for certiorari, and in respondent's draft brief dated "January 1982" which was filed on March 4, 1982 by direction of the Court. However neither of these briefs develops with preciseness and force one of the two keys to an affirmance of the judgments below: the certainty that an interpretation of Section 501(c)(3) of the Internal Revenue Code to allow tax exemptions to racially discriminatory educational institutions would attribute to Congress the enactment of a statutory provision that was beyond its Article I power. The second key to decision herein: whether the Religion Clauses of the 1st Amendment give petitioners special claims to tax exemptions under 501(c)(3) had been adequately dealt with in the briefs of the parties and amici. Respondent in all three of its briefs contends (against petitioners) that if the Court holds that 501(c)(3) bars their tax exemptions, petitioners derive no constitutional comfort from the Free Exercise and Establishment Clauses.

Amicus argues (Point I) that the overt unconstitutionality of a Congressional statute construed to permit tax exemptions to racially discriminatory educational institutions must be in the background of any judicial statutory construction of 501(c)(3). And that such unconstitutionality can be precisely demonstrated by considering the givens of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion of Chief Justice Burger).

Amicus, of course, agrees with respondent and various amici that the Religion Clauses offer petitioner no sanctuary, and that the judgments should accordingly be affirmed.

Amicus proposes affirmance of the judgments, after plenary consideration (Point II), and respectfully urges upon the Court the grave consequences if respondent's winding course induces the Court to give less than full judicial consideration to the intimations herein that this Court's decisions forbidding governmental support of racially discriminatory educational institutions are outdated. For this reason in Point II, amicus further suggests alternative steps which the Court might be prepared to take prior to oral argument to assure a full and fair ventilation of the arguments in support of the judgments of the Court of Appeals in these two cases.

North Carolina Association of Black Lawyers suggests the following analysis of the issues raised herein as a predicate for the Points on which the brief focuses:

1. Whether 501(c)(3) authorizes tax benefits to educational institutions that discriminate on the basis of race is, at most, arguable after giving full attention to the legislative history, administrative practice, and congressional legislation subsequent to *Green v. Connolly*, 330 F.Supp. 1150 (D.D.C.), aff'd per curiam, sub nom. *Coit v. Green*, 404 U.S. 997 (1971).

2. In such an arguable posture, the statute (501(c)(3)) must be construed so as to avoid doubts as to its constitutionality. *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961).

3. 501(c)(3) must therefore be construed not to authorize administrative award of tax exemptions to racially discriminatory educational institutions, because the equal protection component of the fifth amendment due process clause would make unconstitutional a congressional statute construed to authorize tax benefits to educational institutions that concededly discriminate on the basis of race.

4. Assuming (by virtue of propositions 1-3, above) that 501(c)(3) must be construed to prevent award of tax benefits to racially discriminatory educational institutions, the Court would then ad-

dress the only remaining question in this litigation: petitioners' Religion Clauses arguments.

Amicus' Point I below addresses the equal protection analysis referred to in Proposition 3, above, and Point II proposes that the cases proceed to oral argument, with appropriate safeguards.

ARGUMENT

I. IF 501(c)(3) WERE INTERPRETED TO AUTHORIZE TAX EXEMPTIONS TO RACIALLY DISCRIMINATORY EDUCATIONAL INSTITUTIONS, THE STATUTE WOULD VIOLATE THE CONSTITUTION.

Judge Leventhal's opinion in *Green* did not expressly deal with the constitutional issue. Well instructed by this Court, he did not reach constitutional considerations in a case which he concluded could, and therefore should, be decided on statutory grounds. But he left little doubt as to his view of the constitutional implications of a contrary interpretation of 501(c)(3). Should this Court, against *Green*, construe 501(c)(3) as by its terms permitting tax exemptions to racially discriminatory educational institutions it should, in our view, hold the statute unconstitutional as applied to these petitioners.

The deliberate and intentional award of a tax exemption to an avowedly racially discriminatory educational institution would violate the equal protection component of the fifth amendment. Congress' Article I power to tax plus the Necessary and Proper clause is clearly sufficient to justify the grant of tax exemptions of the general character covered by 501(c)(3). But the Necessary and Proper clause, according to the classic interpretation of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), does not authorize legislation that is against the "letter and spirit" of the Constitution. The government's throwing its weight on the side of racial discrimination is against the "spirit" of a Constitution that, as interpreted consistently since *Brown v. Board of Education*, 347 U.S. 483 (1954), finally ac-

knowledges that it stands against government support of racial discrimination in any form. But even more to the point is that such government conduct is against the "letter" of the fifth amendment of the Constitution in its equal protection components as interpreted by this Court. Authorities from this Court are legion. *Brown v. Board of Education*, 347 U.S. 483 (1954), *Bolling v. Sharpe*, 347 U.S. 497 (1954), *McLaughlin v. Florida*, 379 U.S. 184 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967), *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *Gilmore v. Montgomery*, 417 U.S. 556 (1974), *Runyon v. McCrary*, 427 U.S. 160 (1976) and, most precisely bearing on the facts herein, *Norwood v. Harrison*, 413 U.S. 455 (1973). This is without mentioning the statutory policy of 28 U.S.C. 1981 and 1982, and the Civil Rights Acts of 1964, 1965 and 1968 as interpreted by this Court. Governmental conduct conferring tax exemptions on racially discriminating educational institutions violates the letter of the Constitution itself. The analysis of Chief Justice Burger in *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980), with respect to equal protection as a limitation upon Congress' Spending Power, clearly extends to Congress' Article I power to tax. The deliberate, intentional act of the United States Government in knowingly awarding a tax exemption to an admittedly discriminatory educational institution would be, under the cases just cited, a violation of equal protection of the laws, and thus beyond Congress' Article I power. To remind the Court of a remarkably detailed and very pointed predicate for this statement, amicus has attached to this brief as Appendix A crucial excerpts from *Norwood v. Harrison*, 413 U.S. 455 (1973).

On this analysis there is no need to explore the question whether a federal tax exemption is the equivalent of an expenditure of federal funds (and thus in direct violation of Title VI of the Civil Rights Act of 1964). In the two cases before the Court there is no question but that the governmental participation in the racial

discrimination itself is intentional. Petitioners concede, even proclaim, their avowed racial discrimination. The government's award, or restoration, of a tax exemption with this knowledge in hand would be clear, direct and intentional action by the government throwing its weight in favor of racial segregation. And were the government to do so only under the mandate of a court order, *Shelley v. Kraemer*, 334 U.S. 1 (1948), considerations would certainly arise.

It is not the racially discriminatory action of petitioners that would be unconstitutional. They may discriminate all they like, racially and otherwise, free from the restraining hand of the Constitution. But the government, federal or state, may not give its support to racial discrimination. To do so would constitute an Equal Protection violation par excellence. Congress is thus without Article I power to authorize such discrimination, or give support thereto, if the cases cited above are to be left standing.

II. AFTER PLENARY CONSIDERATION, WITH APPROPRIATE ADVERSARINESS SAFEGUARDS, THE COURT SHOULD AFFIRM THE JUDGMENTS BELOW, REAFFIRMING THE FULL VITALITY OF DECISIONS OF THIS COURT WITH RESPECT TO GOVERNMENT SUPPORT OF RACIAL DISCRIMINATION.

A. The Court has jurisdiction to proceed herein, and should do so after insuring adequate adversariness by one of several methods available to the Court.

Although this is apparently the first time in the history of the Court that the government has changed its basic substantive position between the time of granting of certiorari and the briefing of this Court, it is not the only current instance in which this government is declining to defend the constitutionality of Congressional statutes, as written. One example is *Immigration and Naturalization Service v. Chadha*, No. 80-1832, argued this Term and presently *sub judice*. Another instance is

United States v. Brainer, 515 F. Supp. 627 (D.Md. 1981) now on appeal in the Fourth Circuit, after the district judge declared the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.*, unconstitutional and the government declined to defend the statute's constitutionality in the Court of Appeals. These cases are variants of the problem of adequate "adversariness" that must trouble the Court in the *Bob Jones University* and *Goldsboro* cases.

As long as an adequate "controversy" in an Article III sense is present in the case, the Court's concern is (1) that the issues in the cases be framed with the "necessary specificity," and that (2) divergent views on issues that bear on the outcome of the cases be contested with the "necessary adverseness and vigor." *Flast v. Cohen*, 392 U.S. 83, 106 (1968).

Some suggestions have been made by various amici with a view to fulfilling these requirements. Among these are:

1. Appointment of a special amicus or intervenor to defend the judgments of the Court of Appeals in this Court.

This course has been taken on extraordinary occasions in this Court. (See cases cited in Supplemental Brief of NAACP et al.), and cf. *United States v. Lovett*, 328 U.S. 303 (1946). As noted above, this seems to be the course now being taken in the Fourth Circuit in the *Brainer* appeal, with the variation that the appointed amicus defends the constitutionality of the statute, and seeks reversal of the judgment below.

2. Reliance upon present amici to adequately defend the judgments of the Court of Appeals.

This course appears to have been adopted by the district court, and this Court, in *Green v. Connolly*, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, sub nom. *Coit v. Green*, 404 U.S. 997 (1971). This alternative has been somewhat discredited by Justice Powell's footnote in

Bob Jones University v. Simon, 416 U.S. 725, at 740, n.11 (1974), but Justice Powell's observation might be blunted by granting plenary review herein.

3. Possible consolidation of these cases with an appeal in *Green v. Regan*, No. 1355-69 (D.D.C.).

This alternative has the attraction that counsel for petitioner Bob Jones University is counsel for the intervenors in *Green v. Regan*, and Norman Chachkin, Esq., who has been active as counsel to *amici* in these cases, is counsel for plaintiffs in *Green v. Regan*. However, present jurisdictional considerations and the possibility that such a course would unduly delay decision of these cases might weigh with the Court against this alternative. And cf. *Regan v. Wright*, No. 81-970 (petition for certiorari filed).

Amicus respectfully suggests to the Court that the course followed by the 9th Circuit in *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980) and apparently accepted by this Court (No. 80-1832, *sub judice*), might be worthy of the Court's consideration in the extraordinary present posture of these cases: Inviting the Senate and House of Representatives to intervene, or appear as an amicus, to defend the judgments below and, incidentally defend the constitutionality of 501(c)(3) in light of the issues developed herein in face of respondent United States' abandonment of the 1970-82 IRS position.

B. The Court should decide these cases on the merits after plenary consideration.

Amicus, North Carolina Association of Black Lawyers, respectfully urges the Court to set these cases down for oral argument and decision and opinions. Neither summary affirmance nor dismissal of the writs as improvidently granted would do justice to the interests of the parties, and the broad public that has been under shock as a result of respondent's series of changing postures.

C. The Court should take the occasion of deciding these cases to reassure the nation that the Court's constitutional decisions concerning governmental support of racial discrimination remain vital.

The respondent's position, both in its political stands and in its formally submitted brief of March 3, 1982 has, in effect, challenged the basic constitutional role of this Court. Amicus respectfully asks the Court to take the occasion of these cases to reassure the public and the American judicial system that the constitutional doctrine barring governmental support of racial discrimination remains as firm in this Court as when the unanimous Court decided *Norwood v. Harrison* (see Appendix A of this brief).

Should the Court not be as convinced as *amicus* that *Norwood*, and the other cases cited, dispose of petitioners' statutory construction position (see pp. 6-7, *supra*), amicus respectfully urges the Court to direct parties, and whomever the Court may specially designate to provide adequate adversariness herein, to brief the following question before oral argument:

> "Whether the equal protection clause of the fifth amendment due process clause would render unconstitutional a congressional statute (501(c)(3)) construed to grant tax exemptions to educational institutions that concededly discriminate on the basis of race."

Amicus, North Carolina Association of Black Lawyers, respectfully urges the Court to reaffirm the vitality of *Norwood v. Harrison* (and the other race discrimination cases) either by frankly affirming the judgments below on constitutional grounds, or by identifying the soundness of the IRS' 1970-1982 construction of 501(c)(3) as entailed by inescapable equal protection requirements (putting together *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Norwood v. Harrison*, 413 U.S. 455

(1973)), and cf. *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (plurality opinion of Chief Justice Burger).

CONCLUSION

For the foregoing reasons amicus, North Carolina Association of Black Lawyers, respectfully requests that this Court:

1. Appoint an amicus or intervenor to defend the judgments of the Court of Appeals in this Court;

2. Set the two cases down for oral argument by the parties and said amicus or intervenor; and

3. Affirm the judgments of the Court of Appeals.

Respectfully submitted,

JOSEPH A. BRODERICK
Attorney of Record,
North Carolina Association
of Black Lawyers

March 1982

Appendix

APPENDIX A

THE DECISIVE THRUST OF NORWOOD v. HARRISON, 413 U.S. 455 (1973)

Of all the Supreme Court cases rebutting petitioners' contentions that they have claim to a tax benefit from the federal government while avowedly pursuing racial discrimination the most telling is *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Norwood*, plaintiffs were black parents of four school children in Mississippi who brought a class action to enjoin the state's extension of a textbook lending program to students attending private schools that practiced racial segregation. The District Court had denied plaintiffs relief, but the Supreme Court unanimously reversed in a memorable opinion by Chief Justice Burger that can best speak for itself, as the following excerpts suggest:

1. "This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion, or of the authority of a State to allow such/schools." (413 U.S. at 457-8)

2. "The narrow issue before us, rather, is a particular form of assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State." (*Id.* at 458)

3. ". . . a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally-mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." (*Id.* at 462-3)

4. "This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. A textbook lending program is not legally distinguishable from the forms of state assistance foreclossed by the prior cases. . . . An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.' *Lee v. Macon County Board of Education*, 267 F.Supp. 458, 475-476(MD Ala. 1967)." (413 U.S. at 463-5)

5. ". . . the Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination." (*Id.* at 466)

6. "The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogther from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal." (*Id.* at 467)

7. ". . . the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of schools which, under the District Court hold-

ing, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially desegregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." (*Id.*)

8. "Under *Brown v. Board of Education*, 347 U.S. 483 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." (*Id.* at 469)

9. ". . . (A)lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." (*Id.* at 470)

10. "However narrow may be the channel of permissible state aid to sectarian schools . . . it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system." (*Id.*)

APPENDIX B

SOME SUGGESTIONS BEARING ON CONTENTIONS OF MR. R. T. McNAMAR AND OTHERS (See Motion for Leave to File Brief *Amicus Curiae*, supra.)

The Court could well temper the result clearly indicated in these cases by straightening some of the curves in notions that have been injected into these proceedings by the government, by petitioners; and and by some others:

1. The notion that while banning tax exemption for race discrimination is good, it is the function of Congress to make the exclusion, and not the IRS.

The 1970-1982 IRS administration of 501(c)(3) was plainly in response to the ruling of the Court in *Green v. Connolly*, 330 F.Supp. 1150 (D.D.C.), aff'd per curiam, sub nom. *Coit v. Green*, 404 U.S. 997 (1971). Far from the IRS usurping Congressional prerogatives, Congress not only made no move to "change" the IRS response to the *Green* order, it would have had no constitutional power to do so. *A fortiori*, neither would the Executive, administering the Congressional statute under Court order.

2. The notion that denial of tax benefits for violation of national policy is a departure from normal tax law.

The denial of tax deductions and benefits to taxpayers who violate "sharply defined national or state policy" has a long and respected history in this Court (*Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (1958), *Hoover Motor Service Co., Inc. v. United States*, 356 U.S. 38 (1958), *Cammarano v. United States*, 358 U.S. 498 (1959), *Commissioner v. Heininger*, 320 U.S. 467 (1943); cf. Government's Draft Brief, p. 13c).

Furthermore, the rule of these cases that the disallowance of particular benefits on policy grounds

does not strip the taxpayer of the right to deduction for ordinary business expenses would have direct implications for petitioners, after affirmance of the decisions below. *Commissioner v. Heininger*, 320 U.S. at 473.

3. The notion that affirmance of the judgments herein because petitioners violated the fundamental national policy against racial discrimination would entail that thereafter departure from any specific government policy would be the basis for revocation of a 501(c)(3) exemption. Petitioner (and others) parade a list of horribles. They suggest that sex discrimination by an all-male, or all-female educational institution, or by a religious seminary that ordains all male ministers would, if these cases are affirmed, per se require mandatory revocation or denial of a 501(c)(3) exemption. And it would be similar with age discrimination, or some other form of disapproved conduct.

Obviously, the rule of law that tax deductions may be denied for violations of "sharply defined national . . . policy" would in each instance be subject to judicial scrutiny where claims of violation of the 1st Amendment Expression or Religion Clauses is made. The "significance" of the particular "sharply defined national . . . policy" might or might not be sufficient to withstand the 1st Amendment challenge. But the fundamental national policy against invidious race discrimination clearly is sufficient (for the reasons outlined at pp. 6-7, *supra*). And that is all these cases need decide.

Amicus Brief

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Nos. 81-1 & 81-3.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

BOB JONES UNIVERSITY,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Motion for Leave to File Brief Amici Curiae, and Brief of Laurence H. Tribe and Bernard Wolfman as Amici Curiae with Respect to Respondent's Motion to Vacate.

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Motion for Leave to File Brief Amici Curiae, and Brief of Laurence H. Tribe and Bernard Wolfman as Amici Curiae with Respect to Respondent's Motion to Vacate.

Pursuant to S. Ct. R. 36.3, Laurence H. Tribe and Bernard Wolfman hereby move for leave to file the attached brief *amici*

curiae with respect to respondent's motion of January 8, 1982, to vacate the judgments of the court of appeals in these cases.*

Amici are teachers, scholars, and students of constitutional law and tax law, respectively, and are members of the Bar of this Court. As such, *amici* have an interest, by no means unique but not insubstantial, in the preservation of this Court's special role as arbiter of nationally significant controversies with respect to such issues as those presented by these cases.

Amici appear *pro sese*, and represent no interested organization, group, or party. Inasmuch as the concern that impels the filing of this motion and the preparation of the accompanying brief is the integrity of this Court and of the legal processes at issue in these consolidated cases, *amici* seek to file the accompanying brief as "friends of the Court" in the original sense of that term. Perhaps for this reason, at least some of the observations and suggestions offered in the accompanying brief have appeared in none of the parties' or potential intervenors' submissions in this Court and, as far as *amici* are aware, in none of the public commentary these cases have generated.

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* *Amici* have orally sought consent of the parties for the filing of the accompanying brief. Petitioners Goldsboro Christian Schools and Bob Jones University have declined consent, as has respondent United States, although the latter has informed *amici* that it has no objection to the filing of their brief.

Because respondent's opening brief has yet to be filed and is not yet due, this motion and brief are timely under S. Ct. R. 36.2 insofar as the United States is treated as "the party supported" herein. *Id.* That *amici* oppose the latter's motion to vacate should not prevent such treatment, since the accompanying brief urges that the circuit court's judgments in favor of the United States (as to which the United States has not confessed error) not be set aside, and since treating this submission as one "in support of neither party," *id.*, would require it to have been filed well in advance of the January 8, 1982, motion to which it responds.

Conclusion.

Accordingly, *amici* respectfully move that leave be granted to file the attached brief.

Respectfully submitted,

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February 10, 1982.

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Brief of
Laurence H. Tribe and Bernard Wolfman
as Amici Curiae
with Respect to
Respondent's Motion to Vacate.

Interest of Amici.

As the accompanying motion explains more fully, *amici* are scholars and teachers of constitutional law and tax law who

appear on their own behalf in order to address matters that bear on the potential abuse of this Court's processes — matters that might not otherwise be brought to the Court's attention.

Summary.

Although the usual predicate for the grant of certiorari in a federal tax case — a conflict between circuits — was and is not present here, the Court granted the writs in these cases after the Government, acquiescing in plenary review, asserted that a "definitive decision by this Court" was needed to "dispel the uncertainty surrounding the propriety of the [Internal Revenue] Service's ruling position and [to] foster greater compliance on the part of the affected institutions." Brief for the United States at 17. The Government supported certiorari so that this Court might affirm "the decisions below [that] correctly held that the Internal Revenue Service acted within its statutory authority in revoking petitioners' tax-exempt status . . . ." *Id.* at 11. The Government's brief states: "[T]here is no conflict of appellate decisions and we believe that the decisions of the court of appeals [in the pending cases] are correct . . . ." *Id.* at 15.

The Court granted certiorari on October 13, 1981. But on January 8, 1982, the Government filed a memorandum "ask[ing] that the judgments of the court of appeals be vacated as moot." The Government did not — and does not — confess or assert error. It did not and does not change its position that the law is reflected correctly in the judgments of the Fourth Circuit.

Amici urge the Court not to vacate the judgments of the court of appeals. If the Court chooses not to have the pending

cases proceed to argument and decision on the merits,[1] it should either dismiss the writs of certiorari as improvidently granted or leave the Fourth Circuit's judgments in place temporarily while referring to that Court, in the first instance, the parties' various allegations with respect to how subsequent developments bear upon the proper disposition of these cases — including the proper disposition of the two inconsistent district court judgments (one holding that Bob Jones University is tax exempt, the other that Goldsboro Christian Schools is taxable) that would be left in place were the Fourth Circuit's judgments simply to be vacated as the Government requested on January 8.

Argument.

I. The Assertion of Mootness.

The Government bases its mootness claim on the Treasury Department's decision "to revoke forthwith the pertinent Revenue Rulings that [it had] relied upon to deny petitioners tax exempt status under the Code." (Footnote omitted.) Accordingly, the Treasury has "initiated the necessary steps" to provide the petitioners tax-exempt status notwithstanding the judgments of the Fourth Circuit that under the law they are taxable. Memorandum of January 8, 1982.

On January 18, 1982, contrary to the underlying basis of this mootness claim, the Treasury Department announced that the Internal Revenue Service would "not . . . act on any

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[1] The Court might, of course, proceed to the merits after granting the January 15, 1982, motion of the NAACP, *et al.*, to intervene as respondents or to participate as *amici curiae*, or after appointing another suitable intervenor or *amicus*, to defend the Fourth Circuit's judgments. *See* p. 7 & n.5 *infra*.

applications for tax exemptions . . . in response to the Internal Revenue Service's policy announced on . . . January 8, 1982, until Congress has acted on . . . proposed legislation [that would retroactively affirm the position of the court below] (*except as required by the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982*)." Supplemental Memorandum for the United States at 12a (emphasis added). This is to say that, *except as to petitioners*, the existing practice of denying tax exemption to racially discriminatory schools, and tax deduction to their contributors, would remain national policy until Congress chooses to act.

We note two features of this January 18 announcement. *First*, the announcement makes clear that the legal issue of a racially discriminatory school's entitlement to tax exemption under existing law is anything but moot.[2] *Second*, the an-

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[2] In *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 382-83 (1980), all relevant parties agreed that various accident reports obtained by respondents from television manufacturers, including petitioners, should be released. But one set of respondents contended that an extant lower court order would make release of the reports unlawful, whereas another set of respondents contended that the order could have no such effect. *This dispute over the legal effect of the lower court's order*, this Court held in *GTE*, sufficed in itself to create an Article III controversy notwithstanding the shared *desire* of the parties to release the reports in question and their agreement that the reports *ought* to be released. In the instant case, too, despite the fact that the United States and the two petitioner schools agreed as of January 8 that the specific tax benefits the schools sought should be granted, and evidently share a desire to bring about that result, there remains a controversy as to the legal validity and effect of the two district court orders below and of the Fourth Circuit's judgments affirming one of those orders and reversing the other — judgments which petitioners continue to challenge as legally erroneous but as to which the United States has never confessed or asserted error.

Moreover, even if the United States were formally to abandon its Fourth Circuit victories by confessing error as to both, the district court judgment holding that petitioner Goldsboro Christian Schools is not entitled to tax exemption would remain as an apparent obstacle to the Government's proposed action on behalf of that taxpayer. *See* note 3 *infra* (Cont'd. on p. 5.)

nouncement's assertion that "the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982" "require[s]" the grant of exemption is wholly fallacious. The Government's memorandum is not an order of this Court or any other. If the Treasury chooses to give tax exemption to petitioners while denying it to all other racially discriminatory schools pending congressional action, and does so despite the Fourth Circuit's judgments to the contrary, it does so because it *wishes* to do so for reasons it has never made public.[3] Certainly its memorandum of January 8 does not "*require*" it to do so. The claim of "mootness" — the ground on which the Government asks this Court to vacate the judgments

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Finally, the Government's public statements of January 18, 1982, seem wholly inconsistent with any intention, at least while Congress considers the Administration's proposed legislation, to accord favored tax treatment to schools *similar* to petitioners (or *even to petitioners themselves* apart from the specific years and sums litigated below), or to accord favored tax treatment to *contributors* to any of these schools.

[3] While Internal Revenue Code Section 7122 (a) authorizes the Secretary of the Treasury to "compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense," Section 7122 (b) requires public disclosure of the "opinion of the General Counsel for the Department of the Treasury," including a statement of "his reasons therefor." The only reasons acceptable under current regulations are "[d]oubts as to liability" or "as to collectibility." Treas. Reg. §§ 301.7122-1(a) (1), (2). Indeed, although Section 7122(a) authorizes the Attorney General to "compromise any such case after reference to the Department of Justice for prosecution or defense," the Treasury Department's authority to compromise tax claims *prior* to a reference of such claims to the Justice Department does not extend at all, under current Treasury Department Regulations, to cases where "liability has been established by a valid judgment. . . ." Treas. Reg. § 301.7122-1(a)(1).

The Attorney General's authority to reach a "compromise" under Section 7122(a) most assuredly furnishes no basis for a request that *this Court* use its power to vacate a judgment as a means of facilitating, effectuating, or legitimating whatever benefit the Attorney General has decided to bestow upon a particular taxpayer. *Cf. Rice* v. *Sioux City Cemetery, supra.*

below for the evident purpose of making the Treasury's proposed actions favoring only these two schools appear lawful — is accordingly without foundation. Indeed, what the Government would have this Court do ignores Justice Frankfurter's basic admonition that this Court "does [not] sit for the benefit of the particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (opinion of the Court granting rehearing, vacating judgment, and dismissing writ of certiorari as improvidently granted where intervening statute deprived Court's initial judgment of general significance).

II. The Proper Remedy for the Change in Litigating Posture.

While the Government's new posture thus does not serve to make these cases moot, it does cast doubt on the adequacy with which the Justice Department would *represent* the constitutional and congressional policies that the judgments below vindicate. That circumstance must not be confused with the absence of an Article III case or controversy. It would be strange indeed to nullify an appellate court's judgments, properly entered after a fully adversary contest, solely to remedy inadequate representation by the current champion of those judgments at the bar of this Court.[4] Such inadequacy suggests

[4] If only the Fourth Circuit's judgments are vacated, two inconsistent district court judgments are left to stand, each with precedential effect in its own sphere. If the Court should go beyond the Government's request and vacate all judgments entered in the pending cases, those of the district courts as well as those of the Fourth Circuit, *cf. United States* v. *Munsingwear*, 340 U.S. 36, 40-41 (1950), that would give no guidance to the respective district courts as to whether they should hold the cases in abeyance pending congressional action, hear argument on the question of mootness, or dismiss both the petitioners' complaints and the Government's counterclaims. *Cf. Slayton* v. *Smith*, 404 U.S. 53, 53-54 (1971) (per curiam); *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954).

at most a need to permit defense of the judgments below by the proposed (or other) intervenors or by *amici* appointed by this Court for the purpose.[5]

If recent events and the confusion surrounding them should leave the Court reluctant to proceed to judgment on the merits even with the aid of appropriate intervening parties or suitable *amici*, the proper disposition would seem to be a dismissal of the writs of certiorari as improvidently granted,[6] leaving in place the circuit court's final judgments — judgments that might never have been accepted for plenary review here had the Government not acquiesced in this Court's grants of certiorari.[7] Alternatively, the Court might wish to retain these cases on its docket while referring the proceedings to the Fourth Circuit so that the circuit court might, in the first instance, sort out the parties' vacillating positions as to the status of the dispute, make an initial ruling as to the proper disposition of the cases in light of the as yet unexplained largesse apparently contemplated by the Government as to these two taxpayers,[8] and leave to this Court the task of making a final decision in light of the circuit court's ruling.[9]

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[5] *See, e.g., Brown* v. *Hartlage*, No. 80-1285, 50 U.S.L.W. 3300 (U.S. Oct. 19, 1981); *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 4 (1955). *Cf. United States* v. *Lovett*, 328 U.S. 303 (1946).

[6] *See, e.g., Burrell* v. *McCray*, 426 U.S. 471 (1976); *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955).

[7] *Cf. Prince Edward School Foundation* v. *United States*, 450 U.S. 944 (1981) (denying certiorari over dissents of Rehnquist, Stewart, and Powell, JJ.).

[8] *See* note 3 *supra*.

[9] *See, e.g., Harris* v. *Ross*, 439 U.S. 1001 (1978) (granting motion for "reference" to district court "to consider settlement"); *Artanyi* v. *Kennedy*, 376 U.S. 936 (1964) (referring to district court to "approve compromise settlement"), *cert. dismissed*, 380 U.S. 938 (1965); *Hubsch* v. *United States*, 338 U.S. 440 (1949) (same), *cert. dismissed*, 340 U.S. 804 (1950).

Conclusion.

For the reasons given, *amici* suggest that the Court either proceed to resolve the merits with the assistance of suitable intervenors or *amici*, dismiss the writs as improvidently granted, or refer the matter to the Fourth Circuit for further proceedings prior to a final resolution of the cases by this Court.

Respectfully submitted,

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February 10, 1982.

Amicus Brief

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IN THE

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OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BOB JONES UNIVERSITY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE UNITED CHURCH OF CHRIST AS AMICI CURIAE ON QUESTIONS OF MOOTNESS AND STANDING

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., Petitioner,	)	No. 81-1
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

BOB JONES UNIVERSITY Petitioner,	)	No. 81-3
v.	)	
UNITED STATES OF AMERICA Respondent.	)	

MOTION OF AGENCIES OF THE
UNITED CHURCH OF CHRIST FOR LEAVE
TO FILE BRIEF AMICUS CURIAE
ON QUESTIONS OF MOOTNESS AND STANDING

Avery D. Post, President; Board for Homeland Ministries; Commission for Racial Justice, Office for Church in Society; and Office of Communication of the United Church of Christ ("UCC") hereby request leave of the

Court to file the brief amicus curiae submitted herewith on questions of mootness which have arisen in these proceedings and on the standing of the petitioners to present issues under the Free Exercise Clause of the Constitution of the United States. Consent has been granted by petitioner Bob Jones University and by the United States, as evidenced by the attached letters. Consent has been withheld by Goldsboro Christian Schools, Inc.

UCC has approximately 1,750,000 members organized in 6,462 churches in every state of the United States except Alaska. Under UCC's constitution each church is independent in its own right. The amici are the President and national instrumentalities of UCC recognized or established by the General Synod, which is the chief delegate body of the denomination.

UCC has deep roots in the events which gave rise to the Free Exercise Clause and to the abolition of slavery. The Pilgrims

who fled religious persecution in Europe and landed at Plymouth Rock were forebears of the Congregational Christian Churches which joined in forming UCC. For a time the Congregational Church was an established church in the Connecticut colony. UCC participated in the abolition movement, and following the Civil War, UCC founded colleges open to Black students in each of the states of the Confederacy.

UCC did not submit an amicus brief on the merits in this case because it expected that its views would be adequately represented by the Solicitor General. In the light of the new situation resulting from the filing by the United States of its memorandum of January 8, 1982, UCC respectfully requests leave to file the amicus brief submitted herewith. To the best of our knowledge, no

amicus has yet presented the arguments included in this brief.

Respectfully submitted,

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INTEREST OF AMICI

The interest of the amici is described in the motion for leave to file which is respectfully incorporated herein by reference.

QUESTIONS PRESENTED

This brief will be limited to two questions:

1. Are these cases moot?

2. Have the petitioners established free exercise claims of sufficient quality to merit consideration in these cases?

UCC agrees with the analysis of the three judge court in Green v. Connally, 330 F. Supp 1150, aff'd sub nom, Coit v. Green, 404 U.S. 997 (1971). UCC adopts and joins in the arguments on that issue contained in the amicus briefs submitted by the N.A.A.C.P. Legal Defense and Education Fund and by the American Civil Liberties Union and the American Jewish Committee.

STATEMENT OF THE CASE

(a) On the question of mootness:

On October 13, 1981, this Court granted writs of certiorari in the above cases. The grant had been supported by the Government which stated:

> "Although there is no conflict of appellate decision and we believe that the decisions of the court of appeals are correct, we do not oppose the petitions in these cases. The Internal Revenue Service is currently meeting substantial resistance from church-related and religious schools to enforcement of its position that such institutions are not entitled to tax-exempt status under Section 501(c)(3) if they engage in racially discriminatory practices. This resistance is premised on the argument raised by petitioners in these cases that the Service's revocation or denial of tax-exempt status violates the First Amendment rights of such institutions. For example, in Green v. Regan, No. 1355-69 (D.D.C.), the Service is under an injunctive order to investigate certain private schools in

Mississippi to determine whether they are entitled to tax exemption. There are 29 church-operated schools which have been identified as potentially subject to the court's order, and 12 of those schools have invoked the First Amendment as a bar to compliance with the Service's request for the information necessary to complete its investigation. Pursuant to the government's motion in Green, the court has suspended its injunctive order as it relates to the church schools pending resolution of the First Amendment claims.

"Because of the sensitivity of claims that the Internal Revenue Service's administration of the tax laws violates the First Amendment right of schools to the free exercise of religion, and because of the strong conviction with which such claims are often asserted and adhered to, the Service has been impeded in its efforts to achieve even-handed enforcement in this area against religious institutions. Reliance on the authority of its published rulings or even on the decisions below of a single court of appeals has been inadequate to avoid unseemly confrontations with religious claims in the Service's investigations.

* * *

> "Since there is no likelihood of a ruling by another court of appeals in the near future on these First Amendment questions of substantial public importance to both the Service and the institutions involved, we believe that a definitive decision by this Court will dispel the uncertainty surrounding the propriety of the Service's ruling position and foster greater compliance on the part of the affected institutions."

On January 8, 1982, the Government filed a memorandum with the Court stating that the Treasury Department had taken steps to grant both petitioners tax-exempt status and refund the taxes in dispute and further, that the Department "has commenced the processes necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax-exempt status under the Code." Accordingly, the Government asked that the judgments of the Court of Appeals be vacated as moot.

On January 18, 1982, the President announced that he would seek legislation denying tax-exempt status to private schools that practice

racial discrimination. The Treasury Department announced that it would not grant exemptions to such schools (except to the petitioners in these cases) pending Congressional action.[1/]

At the opening of hearings before the Senate Finance Committee on February 1, 1982, documents were produced showing a sharp division of opinion within the Executive Department on the January 8 policy. Among those expressing concern were Roscoe L. Egger, Jr., head of the Internal Revenue Service; Lawrence G. Wallace, the Deputy Solicitor General in charge of these cases; John F. Murray, of the Justice Department's Tax Division; Theodore Olson, Head of the Department's Office of Legal Counsel, and Peter G. Wallison, General Counsel of the Treasury Department. On February 2, more than 200 lawyers and others in the Justice Department's Civil Rights Division made

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1/ Supplemental Memorandum for the United States at 10a-11a.

public a letter dated January 26th expressing "serious concern" about the change in policy.[2] On February 3, 1982, Howard H. Baker, Jr., the Senate Majority Leader, said that he had advised the White House of his view that legislation was unnecessary and that a joint resolution approving the questioned Revenue Rulings would be sufficient. He said that there were "preliminary indications the White House would accept such a joint resolution." House Speaker Thomas P. O'Neill, Jr. was quoted as saying that neither a resolution nor legislation was needed and that neither would be enacted.[3]

Meanwhile, the plaintiffs in Green applied to the District Court for an order expanding its injunction from Mississippi to the entire United States. District Judge George L. Hart, Jr. denied the application but stated that Treasury officials would be held in contempt if the injunction were not

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2/ New York Times, February 3, 1982, p. A-1.

3/ New York Times, February 4, 1982, p. A-1.

obeyed in the State of Mississippi. The Treasury assured the Court that it would comply with the injunction. An appeal from Judge Hart's order is pending in the District of Columbia Circuit.

(b) On the standing of petitioners:

Bob Jones University has about 5,700 students and offers 50 different academic degrees (JA 63). It is not affiliated with any church, nor does it claim to subscribe to the religious views of any church. Its religious views are the views of its founder Bob Jones and his son and grandson (JA 61-62). Noting that the University could not be described as church-related, the District Court concluded that it must be treated as a church (A 44-45). However, a church is usually a group of persons who hold common religious views and practice those views together. The University's students are members of many different Christian faiths, even including UCC (JA 23-29). Many

of the faiths emphatically disagree with Dr. Jones' scriptural interpretations and with his ideas on racial segregation and miscegenation.[4/] Teachers at the University are expected to be born-again Christians, but that is, of course, no indication that they believe in racial separation (JA 34-35). The University makes no effort to determine the attitudes, religious or otherwise, of applicants for admission in respect to interracial dating and marriage (JA 33-34, 90-91). Nothing in the record tells us the religious views of parents in respect of these matters. Students are not required to engage in any baptism, confirmation or other ceremony of affiliation with the University. The only oath taken by students relates to multiple admission applications (JA 137-8). Students promise to obey University rules and are put on notice that they will be expelled

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4/ Some have stated so in amicus briefs filed in these cases. See, e.g., the brief of the American Baptist Churches in the U.S.A. joined by the United Presbyterian Church in the U.S.A.

if they date or marry outside of their own race or encourage others to do so or if they are members of a group which advocates interracial marriage (JA 197, 277).

The Internal Revenue Service rulings under attack do not compel Bob Jones or any person connected with the University to engage in interracial dating or marriage in violation of his religious views. At most, they pressure the University to allow its students to speak, date and marry in accordance with their individual convictions.[5/]

The facts in Goldsboro are similar to those in Jones. The School has about 750 students (JA 6). Attendance at the School meets the requirements of the State's school attendance laws and it is subject to State regulation of curriculum, faculty and physical facilities (JA 6-7). Although the

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5/ The Executive Committee of the University considered a policy of requiring parental consent for interracial dating and marriage but it was decided that the students were beyond the age of parental control (JA 253). The University did not consider adopting a racially neutral policy such as prohibiting undergraduate marriages generally.

is affiliated with the Second Baptist Church of Goldsboro (JA 3), it is a separate non-profit corporation (JA 5). Its opposition to the mixing of the races is stated to be based on its own religious beliefs rather than on the beliefs of the Second Baptist Church (JA 5-6, 42-45). Teachers are required to take an oath of belief in one God and Jesus Christ and in the inspiration of the Old and New Testaments. (JA 8). So far as the record discloses, they are not required to believe in racial separation. Students and parents are not required to subscribe to any creed. They can come with "any religion under the sun as long as they cooperate" (JA 86). The School's articles of incorporation outline its religious beliefs but contain no reference to racial separation. (JA 6).

The School's principal stated that it believes that the peoples of the world are divided into three main races descended from

the sons of Noah, i.e., Hamites (Orientals, Egyptians, Indians, Negroes), Semites (Hebrews) and Japethites (Caucasians, Germans, Scandinavians, Greeks, Romans, Russians), and that "[God] has commanded that . . . they shall not mix culturally or biologically." (JA 40-41). Notwithstanding this commandment, however, the School has enrolled students who are products of prohibited biological mixtures, i.e., the children of a Japethite parent and a Hamitic or Semitic parent (JA 45). At least four children with one Japanese and one Japethite parent have been accepted. (JA 92). The School has also accepted at least one full-blooded Hamite-an American Indian. (JA 85). The principal of the School testified that he would be willing to accept a limited number of Chinese or Egyptian students (JA 83, Cf. JA 92). He would not, however, accept a Negro because "you have a racial problem in the country and because of the problem in this area" (JA 82).

"Q. Is there anybody, other than a Negro that you would have problems in accepting -- any racial grouping?

A. We don't have problems accepting -- accepting a Negro, except for the climate in the country today. It's not a matter of discrimination.

Q. And the Bible teaches you that when this climate exists in the country, you should not accept Negroes in school, or any racial grouping where this climate exists?

A. Where a climate exists whereby you have a certain race clamoring for certain things within the school's curriculum. Certain -- making certain demands of society, every aspect of society, then I think you are on very thin grounds when you, particularly in a southern region where you open your doors to them in a Christian school situation.

Q. Okay, now, to get back to my question there, but if you just accepted one into the school, one person would not cause a problem?

A. I think it would personally.

Q. Just a single person?

A. Yes, sir."

A founder of the School explained that it was willing to forego its views on separation of the races in order to admit minorities who could not receive a Christian education otherwise, but it was unwilling to accept a Black student "because of the positions taken by groups in this country such as the NAACP, CORE [and] the Federal Government . . ." (JA 90-91). He went on to explain that Blacks were excluded because of the size of the Black population and its militancy (JA 92-93).

Thus there is no showing that any teacher, student or parent connected with Goldsboro is put under pressure by the IRS rulings to act against his or her religious convictions. The school corporation may suffer financially by denial of tax-exempt status. Its officers may thereby be pressed to announce a policy of nondiscrimination with which they sincerely disagree. But such a policy would not require them as indivi-

duals to mix with Hamites or Semites to any significant extent. Moreover the basis of their disapproval is a mixture of secular and scriptural concerns. Segregated schools have a long secular tradition in the United States. They have been defended on educational and social as well as religious grounds. The testimony of the two school principals shows that secular considerations -- i.e., fear of disruption of school discipline by militant blacks -- are dominant in their minds. Scriptural restraints are regarded as something they can and do disregard when the secular consequences are acceptable.

SUMMARY OF ARGUMENT

1. The mere discontinuance of allegedly unlawful action does not moot a case unless it is clear that recurrence of the action is unlikely. This is particularly true where the challenged action is deeply rooted and long standing, and when the

discontinuance occurs after the Court has taken jurisdiction. The Government's about face has not laid to rest the issues in these cases. Although the Government has assured the Court that the Treasury Department will take steps to rescind the rulings under attack, the Treasury has announced that it will not do so immediately and it may never do so. The legality of its proposed actions has been challenged and they cannot in any event be made applicable in the State of Mississippi without further judicial action.

Regardless of Congress action, this Court will ultimately be required to resolve the constitutional issues in these cases. If constitutional interpretation does not resolve issues as to presently accrued taxes, the questions of statutory interpretation will also require resolution. Clearly a prompt decision would promote judicial, legislative and administrative economy. The sharp adversity necessary to a case or controversy

under Article III is clearly present. The exhaustive legal analysis in prior decisions and in the briefs of the parties and amici leaves no doubt that the cases are ripe for adjudication.

2. Bob Jones University has no standing under the Free Exercise Clause since the challenged Revenue Rulings do not exert pressure on any person connected with the University to act against his or her personal religious convictions. At most, the rulings would impel the University to permit its students to speak and act in accordance with their individual religious views. Such an influence would promote religious freedom rather than the reverse.

The Goldsboro School's separationist views are not shown to be the views, religious or otherwise, of its faculty, students and parents nor even the views of the Second Baptist Church which assisted in founding it. The views of the School's officers are a mixture of secular and scriptural ideas, but

the former are dominant. They do not give rise to Free Exercise claims. In any event, these qualified and attenuated religious interests are clearly outweighed by the compelling public interest in the quality of public school education.

These cases would be different if they concerned churches, religious orders or religious seminaries and public policies less urgent than eliminating "the badges of slavery."[6/] A "high and impregnable wall"[7/] must always be maintained between church and state, but it is evident that if the wall is placed too close to the state's vital interests and too far from central religious concerns, it will be repeatedly breached. The exemptions sought by petitioners invite abuse and therefore compel governmental intrusion into matters of

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6/ See Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).

7/ See Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 18 (1947).

conscience. The analysis of the Circuit would make such matters irrelevant and avoid government entanglement in matters of religion.

ARGUMENT

POINT I

THE PROMISED DISCONTINUANCE OF THE GOVERNMENT'S ALLEGEDLY ILLEGAL ACTIONS DOES NOT MOOT THESE CASES IN VIEW OF THE LIKELIHOOD THAT THE ACTIONS INVOLVED WILL RECUR.

"[M]ere voluntary cessation of allegedly illegal conduct does not moot a case." U. S. v. Concentrated Phosphate Export Assn, 393 U.S. 199, 203 (1968), U. S. v. W. T. Grant Co., 345 U.S. 629 (1953).

The rule is particularly applicable to the voluntary abandonment of a practice "where the practice is deeply rooted and long standing" (Gray v. Sanders, 372 U.S. 368, 376 (1963)) and is all the more true when the cessation occurs after the court has taken jurisdiction. Bus Employees v. Missouri, 374 U.S. 74 (1963); cf. Super Tire Engineering Co. v. Mc Corkle, 416 U.S. 115, 129 (1974) (Stewart, J., dissenting). Indeed that was

the holding when the IRS policies here at issue were adopted. Green v. Connally, supra, 330 F. Supp at 1170.

In Church of Scientology of Hawaii v. U. S., 485 F.2d 313 (9th Cir. 1973), the IRS attempted to moot a claim of exemption under section 501(e)(3) of the Internal Revenue Code by tendering a refund of the taxes in dispute. The Court held that the taxpayer was entitled to obtain a judicial determination because the Service might deny exemption in future years.

While the refunds, if actually granted, may satisfy petitioners, there is no present and enforceable assurance to petitioners that the refunds will be forthcoming. Mootness, from the perspective of the petitions (See Network Project v. Corporation for Public Broadcasting, 561 F.2d 963, 968-9 (D.C. Cir. 1977), cert. denied, 434 U.S. 1068 (1978)), is absent. In any event, the announced desires of the original litigants to a controversy are not controlling on a

mootness issue. Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355 (5th Cir. 1976), cert. denied, 430 U.S. 949 (1977).

Whatever the present articulations of the parties, the continuance of the exemptions is clearly precarious. See U. S. v. W. T. Grant Co., supra at 632. The President has declared that petitioners should not be tax-exempt. A declaratory judgment was granted in Green v. Connally, supra, and affirmed by this Court, holding that a 501(c)(3) exemption is not available to schools like petitioners'. That judgment is still in effect. While the IRS may at some future date disregard that judgment, the administrative actions necessary to effect a change in policy have not yet been taken and apparently will not be taken while the subject is under Congressional consideration. At present, this Court has only "statements" by various officers of the Government underpinning its claim of mootness. Such statements, by themselves, do little more than

explain why the Government failed to brief its record position and certainly do not moot that position. See United States v. Concentrated Phosphate Export Ass'n, supra. Further, there is substantial disagreement in the Department of Justice regarding the legality of the Government's proposed actions, and legal proceedings have been instituted to enjoin them. Clearly, there cannot indefinitely be one law for petitioners and another for other schools. Nor can there be one law for Mississippi and another for the rest of the United States. See International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965).

The Congress may, of course, take action to restore order to the situation, but the Congress itself seems stalemated by the uncertainty as to the present state of the law. Moreover, the constitutional issues raised by both sides will have to be resolved, whatever action the Congress might ultimately take.

Admittedly, this Court lacks authority under Article III to issue advisory opinions even when, as here, the public interest cries out for restoration of order. But the Court has before it in these cases well developed factual records, briefs prepared by eminent attorneys well-versed in the legal issues under review, and several exhaustive opinions by the lower courts. There is no doubt that petitioners will argue vigorously if these cases are not found to be moot. If the Government does not wish to defend the decisions below, the Court can allow argument by amici whose commitment is not in question.[8/] A true controversy is not mooted because one side gives up. Rubbermaid Inc. v. Federal Trade Commission, 575 F.2d 1169 (6th Cir. 1978).

8/ The Lawyers Committee for the Defense of Civil Rights under Law has furnished counsel to the Green plaintiffs since its inception.

POINT II

THE REVENUE RULINGS IN QUESTION DO NOT INHIBIT ANY PERSON ASSOCIATED WITH PETITIONERS FROM FOLLOWING RELIGIOUS CONVICTION. ACCORDINGLY PETITIONERS HAVE NO CLAIMS UNDER THE FREE EXERCISE CLAUSE.

Petitioners rely heavily on two decisions of this Court, Sherbert v. Verner, 374 U.S. 403 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). In both cases natural persons were penalized for acting in accordance with their religious convictions. Mrs. Sherbert was a Sabbatarian who was denied unemployment insurance benefits because she refused to work on Saturday. The petitioners in Yoder were Amish parents who were fined for schooling their children on farms in accordance with a long religious tradition. Justice Douglas dissented in Yoder insofar as the decision applied to parents whose children had not testified to their personal beliefs. Id. at 243-46. The Court noted that it was the parents who were to be penalized, and there was no claim that

the children had contrary views. Id. at 230-234. Justices Brennan, Stewart and White emphasized this point in concurring opinions.

The teaching of Yoder is that the religious freedom of parents and students is protected by the Free Exercise Clause. Yoder does not involve the alleged right of school authorities to impose their own "idiosyncratic views" (Id. at 239) on students of different beliefs. Pierce v. Society of Sisters, 268 U.S. 510 (1925) held that parents had the constitutional right to enroll their children in private schools of their own selection, subject, of course, to the state's power to require, inter alia, studies "essential to good citizenship" and "that nothing be taught which is manifestly inimical to the public welfare".[10/] Id. at 534. Nothing in

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10/ We note in passing that racial separation is not "good citizenship" and is "manifestly inimical to the public welfare." Brown v. Board of Education, 347 U.S. 483 (1954).

Pierce suggested that the school had more than an economic interest in seeing that its patrons were not subject to unlawful interference. Id. at 536.[11/] A school restricted to students holding common religious beliefs might have standing to assert Free Exercise claims on their behalf. But neither petitioner claims that its students share its religious views. No case of which we are aware suggests that any person except a parent has a right under the Free Exercise Clause to regulate the religious practices of others. Nor that a corporation can have religious liberties apart from those of its members.

In McGowan v. State of Maryland, 366 U.S. 420 (1961), this Court held that seven department store employees could not

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11/ In Runyon v. McCrary, 427 U.S. 160 at 175, fn.13 (1976), the Court said, "It is clear that the schools have standing to assert those arguments on behalf of their patrons," citing Pierce (emphasis added).

challenge a Sunday closing law since they alleged no infringement of their own religious freedoms. Cf. Braunfeld v. Broun, 366 U.S. 599 (1961). In Welsh v. U. S., 398 U.S. 333 (1970) the Court noted the "intensely personal" nature of religious belief and in Thomas v. Review Board of Indiana, 450 U.S. 909 (1981) the Court noted that intrafaith differences are not uncommon and it is the convictions of the particular adherant which give rise to Free Exercise claims. The seminal "Virginia Bill for Religious Liberty"[12/] stated:

> "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ." (Emphasis added)

12/ The historic setting and importance of the Virginia Statute of Religious Freedom is discussed in Everson v. Board of Education, 330 U.S. 1 at 11-13 (1947). See also Jones v. Opelika, 316 U.S. 103, on rehearing, 319 U.S. 103, 894, fn. 5 (Reed, J., dissenting) (1943).

And this Court's discussion of both the Free Exercise and Establishment Clauses has usually been couched in terms of individual freedoms.[13/]

Sustaining Free Exercise claims in Jones would protect its officers' contract right to enforce their religious views against students who may not agree. But as the Court stated in Norwood v. Harrison, 413 U.S. 435, 470 (1973) and repeated in Runyon v. McCrary, 427 U.S. 160, 176 (1976): "while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections'". Assuming arguendo that Goldsboro stands higher than Jones because its religious principles prohibit mere association, these principles are so readily yielded by its officers when there are no secular concerns that they lack

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13/ See e.g. Everson, 330 U.S. at 15-16.

the "quality" to outweigh compelling state interests, Cf. Wisconsin v. Yoder, supra at 215.

Granting tax exemption to schools like Bob Jones University and the Goldsboro Christian School while denying it to other private schools with similar policies would raise serious Establishment issues. In Walz v. Tax Commission, 397 U.S. 664 (1970), the Court sustained real property tax exemptions for churches but noted that New York

> ". . . has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." Id. at 672-73.

"White flight" from the unitary school system is not a minor or isolated phenomenon.

A policy which granted tax exemptions to segregated schools sponsored by fundamentalist religious sects but not to segregated schools sponsored by others would certainly promote such sects. Moreover it would to some degree promote the principles of racial separation espoused by such groups.

Commenting on Walz, this Court said that "'neutrality in matters of religion is not inconsistent with 'benevolence' by way of exemption from onerous duties...so long as an exemption is tailored broadly enough that it reflects valid secular purposes." Gillette v. United States, 401 U.S. 437, 454 (1971). But what is sought here is an exemption narrowly confined to religiously motivated racists or, consistent with Welsh, supra, intensely dedicated racists. Mr. Justice Frankfurter, who was one of this Court's most consistent and reasoned advocates of judicial restraint, said this:

> "The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 653 (1943).

UCC unalterably favors a "high and impregnable wall" between church and state, but such a wall can survive only so long as each respects the interests of the other. The public interest in equal educational opportunity for all children is so compelling and the policies of Brown and Runyan are so necessary to that goal as to fall clearly under the authority of the state. Recognizing free exercise claims in these circumstances would invite exaggerated and even fraudulent claims by other schools seeking exemption and would inevitably bring searching inquiry and government entanglement in matters of conscience and belief. Brown v. Dade Christian Schools, Inc., supra, 556 F.2d

at 323. Cf. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 502-3 (1979). This will not serve the interests of any church.

CONCLUSION

The Court should retain jurisdiction of these cases and should dismiss petitioners constitutional claims for lack of standing. The decisions below should be affirmed.

Respectfully submitted,

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Petitioner's Reply Brief

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Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

RESPONSE OF GOLDSBORO CHRISTIAN SCHOOLS, INC. TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SHCOOLS, INC., PETITIONER

v.

UNITED STATE OF AMERICA, RESPONDENT

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

RESPONSE OF GOLDSBORO CHRISTIAN SCHOOLS, INC. TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS

On March 16, 1982, the North Carolina Association of Black Lawyers filed with this Court a Motion for Leave to File a Brief Amicus Curiae. In support of its motion, the Movant states that it "had until the March developments been content to have its concerns presented (as they had been below, and in the respondents' brief on the Petition for Certiorari) by the United States." Motion of Black Lawyers at 2. The Movant's "concerns" in this case are succintly stated in the formulation of the question that the Movant has asked this Court to set down for oral argument:

> "Whether the equal protection clause of the fifth amendment due process clause would render unconstitutional a congressional statute (501(c)(3)) construed to grant exemptions to educational institutions that concededly discriminate on the basis of race."

Brief of Black Lawyers at 10.

The issue whether the denial of tax-exempt status to racially discriminatory private schools is constitutionally compelled, however, is one that has never been raised in the courts below. In the Goldsboro case, the United States stated in its brief to the district court that "the tax benefits attendant upon qualification as a Section 501(c)(3) organization do not constitute such federal financial expenditures as to be subject to constitutional limitations or limitations upon expenditures by Title VI of the Civil Rights Act of 1964." Brief of United States in Support of Motion for Partial Summary Judgment at 26 n. 10, Goldsboro Christian Schools, Inc. v. United States, 436 F.Supp. 1314 (E.D.N.C. 1977). Having made this disclaimer in the district court in the Goldsboro litigation, the United States did not make any constitutionally based argument for the denial of tax-exempt status in either its brief to the Fourth Circuit or its brief in response to the petitions for certiorari in the Goldsboro and Bob Jones case. Similarly, in the brief it filed in these consolidated cases on March 3, 1982, the United States rejected the argument that the denial of tax-exempt status to petitioners is constitutionally compelled. Brief of United States at 42-45. Moreover, even in the draft brief prepared by the Solicitor General's office that was rejected by both the Department of Justice and the Treasury Department (copies of which were lodged with the Court on March 4, 1982 at the request of the Clerk), the position was not taken that the granting of tax-exempt status to the petitioners would be unconstitutional.

Draft Brief at 34. Therefore, the Movant could not possibly have relied on the United States to present its constitutional "concerns" in these cases, and it should not be allowed to raise for the first time before this Court an argument that was never raised before the lower courts in these cases.

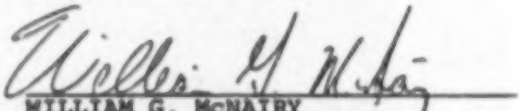
Movant was put on notice at the time the United States disclaimed any reliance on either the Constitution or Title VI of the Civil Rights Act of 1964 before the district court in the Goldsboro case that any "interests" that it had in seeing a constitutional issue addressed in that case were not being adequately protected. Therefore, the argument of the Movant that its brief should be accepted for consideration out of time is totally unfounded. Cf. United Airlines, Inc. v. McDonald, 422 U.S. 386, 394 (1977) (for intervention to be timely, it must be attempted as soon as it becomes clear that the interests of the intervenor are no longer being protected by parties to the action).

In addition, under Supreme Court Rule 34.1(a), a "brief may not raise additional questions or change the substance of the questions already presented in [the jurisdictional statement or the petition for certiorari]." Accordingly, this Court has refused to consider constitutional claims raised for the first time in a brief filed in this Court. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 323, n.1 (1977); United States v. Ortiz, 422 U.S. 891, 898 (1975). Further, the Movant has failed to cite this Court to any case, and research by petitioner Goldsboro Christian Schools, Inc. has revealed no case, in which this Court has affirmed an appeals court ruling based on an argument that was never presented to the lower court. In fact, Justice White recently

implied that there was no such opinion in his questioning of the attorney for the United States in American Tobacco Co. v. Patterson, No. 80-1199 (argued Jan. 19, 1982), discussed in 50 U.S.L.W. 3629, 3630 (Feb. 16, 1982). Therefore, the Court should refuse to consider the argument advanced by the Movant that the granting of tax-exempt status to racially discriminatory private schools is violative of the fifth amendment due process clause.

Accordingly, petitioner Goldsboro Christian Schools, Inc. respectfully submits that this Court should deny the motion of the North Carolina Association of Black Lawyers for leave to file a brief amicus curiae because that motion is untimely, and should further refuse to consider the issue whether the denial of tax-exempt status to racially discriminatory private schools is constitutionally compelled because that issue has never been raised before any of the lower courts in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 1982, a copy of the foregoing was mailed, postage prepaid, to the following:

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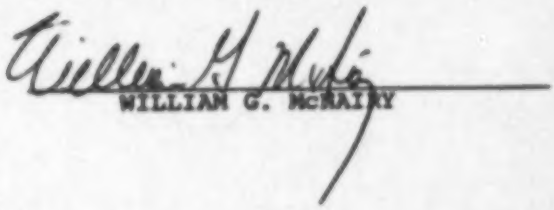

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Petitioner's Reply Brief

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A. Response to Motion of Laurence H. Tribe and Bernard Wolfman.

Laurence H. Tribe and Bernard Wolfman have sought leave of the Court to file, as Amici Curiae, a response to the Memorandum of the United States filed on January 8, 1982.

Petitioner, Goldsboro Christian Schools, has refused to consent to the filing of this proposed response and opposes the Motion of Laurence H. Tribe and Bernard Wolfman for the reasons stated in the Response of Petitioner, Bob Jones University.

B. Response to Motion of the United Church of Christ.

Agencies of the United Church of Christ have sought leave of the Court to file, as Amicus Curiae, a brief which responds to the Memorandum of the United States filed on January 8, 1982 and which addresses the merits of this case. Petitioner, Goldsboro Christian Schools, has refused to consent to the filing of this proposed brief and now states its objection thereto.

The Motion is not timely. Rule 36.2 of the Supreme Court Rules requires a brief of an amicus curiae to be filed within the time allowed for filing of the brief of the "party supported" or within the time allowed for filing petitioner's briefs if "in support of neither party." Because Movant supports neither party, the time for filing its brief has already expired.

Movant stated that it did not previously submit an amicus brief because it expected that "its views would be adequately represented by the Solicitor General." (Motion, 3). The reason cited by Movant is without foundation because the arguments on the merits advanced by Movant in its proposed brief were not made by the United States in the courts below. Thus, the United Church of Christ could not have expected that its views would be adequately represented by the Solicitor General.

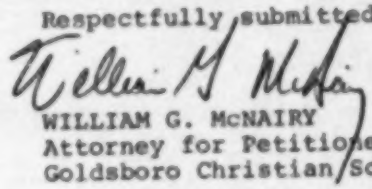
Furthermore, the Rules of the Court do not provide for amicus participation in motions filed with the Court.

To the extent that Movant's proposed brief discusses the mootness issue raised by the Memorandum of the United States filed on January 8, 1982, it is outside the scope of the rules.

Conclusion

Petitioner, Goldsboro Christian Schools, therefore urges the Court to refuse its leave to file the brief Amici Curiae of Messrs. Tribe and Wolfman and to refuse its leave to file the brief Amicus Curiae of the United Church of Christ.

Respectfully submitted,



WILLIAM G. McNAIRY
Attorney for Petitioner
Goldsboro Christian Schools, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of February, 1982, a copy of the foregoing Response of Petitioner, Goldsboro Christian Schools, Inc., was mailed, postage prepaid to the following:

Lawrence G. Wallace
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

William Bentley Ball
BALL & SKELLY
511 North Second Street
Post Office Box 1108
Harrisburg, Pennsylvania 17108

Earle K. Moore
MOORE, BERSON, LIFFLANDER & MEWHINNEY
555 Madison Avenue
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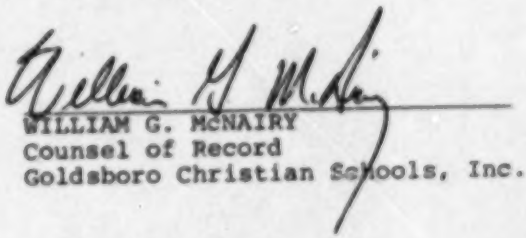
Laurence H. Tribe
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138



WILLIAM G. McNAIRY
Counsel of Record
Goldsboro Christian Schools, Inc.

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

RESPONSE OF PETITIONER BOB JONES UNIVERSITY TO MOTION OF NAACP, ET AL., TO INTERVENE AS RESPONDENTS, OR, IN THE ALTERNATIVE, TO PARTICIPATE AS AMICI CURIAE

WILLIAM BENTLEY BALL
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Harrisburg, PA 17108

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

RESPONSE OF PETITIONER BOB JONES UNIVERSITY TO MOTION OF NAACP, ET AL., TO INTERVENE AS RESPONDENTS, OR, IN THE ALTERNATIVE, TO PARTICIPATE AS AMICI CURIAE

Petitioner Bob Jones University opposes the motion of the National Association for the Advancement of Colored People ("NAACP"), et al., to intervene as respondents herein, or to participate in oral argument as amici curiae.

Movants do not possess the requisite standing to litigate the tax liability of a third party. Eastern Kentucky Welfare Rights Organization v. Simon, 426 U.S. 26 (1976). No concrete injury to the movants can possibly be redressed by imposition

of taxation on two religious institutions. Nor has any record been developed which could assist this Court in assessing the claims being advanced by the movants. In the absence of any such record, this Court is being asked to adjudicate the unsubstantiated claims of a purely ideological party. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ___ U.S. ____, 50 U.S.L.W. 4103 (January 12, 1982).

Intervention at this juncture is a highly unusual step to be requested of this Court. It is even more unusual for this Court to be asked to manufacture a case or controversy by choosing a party to advocate a particular point of view before it -- most especially a party which had not the remotest connection to the matter at hand at any time prior.

DATED: February 9, 1982

Respectfully submitted,

William Bentley Ball

WILLIAM BENTLEY BALL

PHILIP J. MURREN
RICHARD E. CONNELL
KATHLEEN A. O'MALLEY

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(717) 232-8731

Attorneys for Petitioner
Bob Jones University

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 1982, a copy of Response of Petitioner Bob Jones University to Motion of NAACP was mailed to each of the following:

Hon. Lawrence G. Wallace
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William G. McNairy, Esq.
Brooks, Pierce, McLendon,
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William Bentley Ball

William Bentley Ball

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

RESPONSE OF PETITIONER BOB JONES UNIVERSITY TO MOTION OF LAURENCE H. TRIBE AND BERNARD WOLFMAN FOR LEAVE TO FILE BRIEF AMICI CURIAE

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Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

RESPONSE OF PETITIONER BOB JONES UNIVERSITY TO MOTION OF LAURENCE H. TRIBE AND BERNARD WOLFMAN FOR LEAVE TO FILE BRIEF AMICI CURIAE

Laurence H. Tribe and Bernard Wolfman, reciting an interest as "teachers, scholars, and students of constitutional law and tax law", have sought leave of this Court to file, as amici curiae, a response to the Memorandum of the United States which was lodged with the Court on January 8, 1982.

Petitioner Bob Jones University has refused to consent to the filing of this proposed response, and now states its

objection thereto.

The motion is not timely. Rule 36.2 requires a brief of an amicus to be filed within the time allowed for filing of the brief of the "party supported." (Emphasis added). Yet movants do not support a party; they instead support a position with which no present party agrees. Since they are in support of neither party, the time for filing their brief has already expired.

Movants admit that their interest as academics is "by no means unique" (Motion, 2), and in this they are correct. Scholarly interest in these cases is far-ranging and is not confined solely to the point of view represented by Mr. Tribe and Mr. Wolfman (i.e., that the handling of these cases by the United States has evidenced "grave abuses of office" and is "racist". Statements of Laurence H. Tribe reported at page A 12, New York Times, February 5, 1982.). Movants assert an interest in "the integrity of this Court and of the legal processes at issue." That interest is shared by all parties to these cases. Yet movants clearly announce their view that the judgments below were correct, and, since they appear only pro sese, their opinions as to the merits of the issues originally accepted for review by this Court herein cannot be divorced from the procedural "suggestions" they seek to offer to the Court. They cannot be viewed as objective "'friends of the Court,' in the original sense of that term" who disinterestedly offer needed counsel.

It is inherently dangerous to assume that a broad and uniform scholarly interest can be advanced, pro se, by any individual. This Court is the best guarantor of its own integrity and of the legal processes involving the cases which come before it. It is not necessary that individual attorneys, representing only themselves, provide unsolicited advice to

the Court on such matters.*

Lacking any concrete, substantial interest in the outcome of these cases, movants should not be permitted to argue their contentions.

Petitioner Bob Jones University therefore urges the Court to refuse its leave to file the brief amici curiae of Messrs. Tribe and Wolfman.

DATED: February 17, 1982

Respectfully submitted,

WILLIAM BENTLEY BALL

PHILIP J. MURREN
RICHARD E. CONNELL
KATHLEEN A. O'MALLEY

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511 North Second Street
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Harrisburg, PA 17108
(717) 232-8731

Attorneys for Petitioner
Bob Jones University

* The Rules of this Court permit amici curiae to file briefs, but make no mention of amicus participation in the motion practice of the Court. To the extent that the instant request seeks permission to advise the Court as to the propriety of granting a motion by the United States to vacate the judgments of the Fourth Circuit as moot, it is outside the scope of the Rules.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 1982, a copy of Response of Petitioner Bob Jones University to Motion of Laurence H. Tribe and Bernard Wolfman was mailed to each of the following:

Hon. Lawrence G. Wallace
Acting Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

William G. McNairy, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard
P. O. Drawer U
Greensboro, NC 27402

Laurence H. Tribe
1525 Massachusetts Avenue
Cambridge, MA 02138

William Bentley Ball
William Bentley Ball

DATED: February 17, 1982

Docket Sheet

NO. 81-1-CFX (Vide: 81-3) See: 81-1626	TITLE Goldsboro Christian Schools, Inc., Petitioner v. United States

DOCKETED	COURT
July 2, 1981	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: William G. McNairy
	Counsel for Respondent: Solicitor General
July 2, 1981	Petition for writ of certiorari filed. (Record filed).
Aug. 5, 1981	Order extending time to file a response to the petition until Aug. 31, 1981.
Sept. 9, 1981	Brief for respondent filed. (See : 81-3).
Sept. 16, 1981	DISTRIBUTED. 10/9/81.
Oct. 13, 1981	Petition GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument.

Nov. 27, 1981	Joint appendix filed.
Nov. 27, 1981	Brief for the petitioner filed.
Nov. 30, 1981	Brief, amicus curiae, of The National Jewish Commission on Law and Public Affairs (COLPA) filed. (Vide: 81-3).
Dec. 4, 1981	Motion of Goldsboro Christian Schools, Inc. for divided argument and for additional time for oral argument filed.
Dec. 4, 1981	Response of Bob Jones University filed.
Dec. 14, 1981	The motion of Goldsboro Christian Schools, Inc. for divided argument and for additional time for oral argument is DENIED. The motion of Trent Lott for leave to file a brief as amicus curiae in No. 81-3 is GRANTED.
Dec. 31, 1981	Brief for the Lawyers' Committee for Civil Rights Under Law, as amicus curiae, in support of the respondent filed. (Vide: 81-3).
Jan. 5, 1982	Brief, amici curiae, of the American Civil Liberties Union and The American Jewish Committee filed. (Vide: 81-3)
Jan. 4, 1982	Order extending time to file the respondent's brief on the merits until Jan. 10, 1982.
Jan. 8, 1982	Respondent's suggestion of mootness filed. (Vide: 81-3)
Jan. 8, 1982	Memorandum for the U. S. filed. (D). (Vide: 81-3).
Jan. 12, 1982	DISTRIBUTED. 1-15. (Suggestion of mootness).
Jan. 12, 1982	Opposition by petitioner in 81-3 to respondents suggestion of mootness filed. (Also in 81-3)
Jan. 14, 1982	Response of petitioner in 81-1 to suggestion of mootness.
Jan. 15, 1982	Motion of NAACP to intervene as respondents filed., or in the alternative to participate as amici curiae.
(Also in 81-3)	(Over)

Title

No.

DATE	PROCEEDINGS AND ORDERS
Jan. 9, 1982	Brief, amicus curiae, of The NAACP Legal Defense and Educational Fund filed. (Vide: 81-3)
Jan. 18, 1982	DISTRIBUTED. 1-22. (Suggestion of mootness, and Motion of NAACP, et al. for leave to intervene or in the alternative to participate as amici curiae).
Jan. 20, 1982	Opposition filed by petitioner in 81-3 to Motion of NAACP, et al. for leave to intervene or in the alternative to participate as amici curiae filed.
Jan. 21, 1982	Response of petitioner in No. 81-1 to motion of NAACP filed.
Feb. 3, 1982	Supplemental memorandum for the U. S. filed. (Vide: 81-3)
Feb. 10, 1982	Response of petitioner in No. 81-3 to motion of NAACP filed.
Feb. 10, 1982	Motion of Laurence H. Tribe, et al. for leave to file a brief as amici curiae filed. (Vide: 81-3)
Feb. 17, 1982	Motion of Agencies of the United Church of Christ for leave to file a brief as amicus curiae filed. (Vide; 81-3)
Feb. 17, 1982	Motion of Lawyers' Committee for Civil Rights Under Law, et al. for leave to file a supplemental brief as amici curiae filed. (Vide: 81-3).
Feb. 23, 1982	DISTRIBUTED. 2-26. (Above motions, suggestion of mootness)
Feb. 24, 1982	Supplemental memorandum of petitioner filed. (NP).
Feb. 24, 1982	Opposition by petitioners in 81-1 filed to motion of Laurence H. Tribe, et al.
Feb. 24, 1982	Opposition by petitioners in 81-1 filed to motion of Agencies of the United Church of Christ.
Feb. 25, 1982	Motion of the Solicitor General to file a brief out of time filed.
Feb. 25, 1982	Motion of respondent for leave to file motion for divided argument out of time, and motion for divided argument filed.
Feb. 25, 1982	DISTRIBUTED. 2-26. (Above motions).
Feb. 25, 1982	Brief for the U. S. received. (D) (Vide: 81-3.)
Mar. 2, 1982	REDISTRIBUTED. 3-5. (Above motions).
Mar. 3, 1982	← Motion of petitioner in No. 81-3 for summary reversal.
March 3, 1982	Motion of petitioner in N. 81-1 for summary reversal filed
March 3, 1982	DISTRIBUTED. 3-5. (Above motions)
March 9, 1982	Lodgings by Goldsboro Christian Schools, Inc. filed. (Also in 81-3).
March 16, 1982	DISTRIBUTED. 3-19. (Above motions)
March 16, 1982	Motion of North Carolina Association of Black Lawyers for leave to file a brief as amicus curiae filed. (D).

(Card No. 2)

NO.	TITLE
81-1-CFX (Vide: 81-3) (See: 81-1626)	Goldsboro Christian Schools, Inc., Petitioner v. United States

DOCKETED	COURT
July 2, 1982	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
March 23, 1982	DISTRIBUTED. 3-26. (Above motions).
March 24, 1982	Opposition of Goldsboro Schools to motion of North Carolina Association of Black Lawyers for leave to file a brief as amicus curiae filed. (Also in 81-3).
March 30, 1982	DISTRIBUTED. 4-2. (Above motions).
Apr. 13, 1982	REDISTRIBUTED. 4-16. (Above motions).
Apr. 19, 1982	(1) The motion of National Association for the Advancement of Colored People, et al. for leave to intervene as parties respondent and for leave to participate in oral argument is DENIED. (2) The alternative request to file a brief as amici curiae is GRANTED. (3) The motion of Laurence H. Tribe and Bernard Wolfman for leave to file a brief as amici curiae is GRANTED. (4) The motion of Agencies of the United Church of Christ for leave to file a brief as amicus curiae is GRANTED. (5) The motion of Lawyers' Committee for Civil Rights Under Law, et al. for leave to file a supplemental brief as amici curiae is GRANTED. (6) The motion of North Carolina Association of Black Lawyers for leave to file a brief as amicus curiae is GRANTED. (7) The motion of the Solicitor General for leave to file a brief on the merits out-of-time is GRANTED. (8) The motion of the Solicitor General for leave to file a motion for divided argument out-of-time is GRANTED. (9) The motion of petitioner in No. 81-3 for an order directing respondent to act with respect to respondent's memorandum filed January 8, 1982 is DENIED. (10) The motions of petitioners for summary reversal are DENIED. (11) William T. Coleman, Jr., Esquire, of Washington, D.C., a member of the Bar of this Court, is invited to brief and argue these cases, as amicus curiae, in support of judgments below.
Aug. 20, 1982	Motion of Bob Jones University for divided argument and for additional time for oral argument filed.
Aug. 25, 1982	Brief, amicus curiae, of William T. Coleman, Jr. in support of the judgments below filed.
Aug. 25, 1982	CIRCULATED.
Aug. 24, 1982	Motion of National Association of Independent Schools for leave to file a brief as amicus curiae filed. (Vide: 81-3)
Aug. 25, 1982	Motion of Independent Sector for leave to file a brief as amicus curiae filed. (Vide: 81-3)

(OVER)

Title | No.

DATE	PROCEEDINGS AND ORDERS
Aug. 24, 1982	Motion of Lawrence E. Lewy for leave to file a brief as amicus curiae filed. (Vide: 81-3)
Aug. 25, 1982	Motion of International Human Rights Law Group for leave to file a brief as amicus curiae filed. (Vide: 81-3)
Aug. 25, 1982	Response of William T. Coleman, Jr., amicus curiae, file (Vide: 81-3)
Aug. 25, 1982	Brief, amicus curiae, of the National Association for the Advancement of Colored People, et al. filed. (Vide: 81-3
Aug. 27, 1982	Motion of Anti-Defamation League of B'nai B'rith for leave to file a brief as amicus curiae filed. (Vide: 81-3)
Aug. 25, 1982	Application of William T. Coleman, Jr., for leave to file amicus curiae brief in excess of page limitations, and order granting same by Burger, CJ., 8/27/82, not to exceed 69 pages.
Aug. 27, 1982	Motion of Goldsboro Christian Schools, Inc. for divided argument and for additional time for oral argument filed (Also in 81-3).
Aug. 31, 1982	Response of the Solicitor General to motion of Bob Jones University for divided argument and for additional time for oral argument filed. (Also in 81-3).
Aug. 25, 1982	CIRCULATED.
Sept. 10, 1982	Application for leave to file reply brief on behalf of Bob Jones University in excess of page limitations, and order granting same by Burger, CJ., not to exceed 30 pages. 9/10/82.
Oct. 4, 1982	The motion of National Association of Independent Schoo for leave to file a brief as amicus curiae is GRANTED. The motion of Lawrence E. Lewy for leave to file a brief as amicus curiae is GRANTED. The motion of Independent Sector for leave to file a brief as amicus curiae is GRANTED. The motion of International Human Rights Law Group for leave to file a brief as amicus curiae is GRANTED. The motion of Anti-Defamation League of B'nai B'rith for leave to file a brief as amicus curiae is GRANTED. The motions for divided argument and for additional time for oral argument are GRANTED and a total of one hour and fifteen minutes is allotted for oral argument to be divided as follows: 15 minutes for Goldsboro Christian Schools, Inc., 15 minutes for Bob Jones University; 15 minutes for the United States; and 30 minutes for William T. Coleman, Jr., Esquire, as amicus curiae.

(Card No. 3)

NO.	TITLE
81-1-CFX (Vide: 81-3) See: 81-1626	Goldsboro Christian Schools, Inc., Petitioner v. United States

DOCKETED	COURT
July 2, 1981	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
Oct. 5, 1982	Reply brief of petitioner Goldsboro Christian Schools, Inc. filed. (D).
Oct. 5, 1982	Reply brief for the United States filed. (D). (Vide: 81-3).
Oct. 12, 1982	ARGUED.